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OCTOBER TERM, 1978

No. 78-

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and **ILLINOIS INSTITUTE OF TECHNOLOGY**, a not-for-profit corporation,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

CHICAGO HISTORICAL SOCIETY, et al.,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS**

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To: The Justices of the
Supreme Court of the United States

Petitioners, **ELIZABETH B. STUART**, not individually, but as a co-trustee under the last will and testament of Harold L. Stuart, deceased, and **ILLINOIS INSTITUTE OF TECHNOLOGY**, an Illinois corporation not-for-profit, plaintiffs in the case below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois filed and entered in that proceeding on January 26, 1979.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Illinois filed and entered January 26, 1979 (hereinafter sometimes referred to as the "Remanded Cause" or "Stuart II"), reported at 75 Ill.2d 22; 387 NE2d 312 (1979), is reproduced as Appendix C hereto. The judgment and opinion of that court filed and entered October 5, 1977 (hereinafter sometimes referred to as the "Original Cause" or "Stuart I") reported at 68 Ill.2d 502; 369 NE2d 1262 (1977), is reproduced in pertinent parts as Appendix A hereto. The mandate of the court, entered on the October 5, 1977 opinion, is also reproduced as Appendix B hereto.

JURISDICTION

The judgment and opinion of the Supreme Court of Illinois here sought to be reversed was entered on January 26, 1979. A timely petition for rehearing in said cause was denied on March 30, 1979, without opinion, and this petition for writ of certiorari was filed within 90 days of that date. The court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

This case presents an apparent instance of majority action by a state's highest court, over dissent of two of its members, reversing in a subsequent remand proceeding in the same case the court's earlier adjudication in the original opinion expressly finding a party's entitlement to relief for which it pleaded in the complaint. The questions now presented are:

1. May a court, consistent with procedural due process under the Fourteenth Amendment, having without limitation adjudicated a party's entitlement to relief expressly pleaded in the complaint, subsequently reverse that adjud-

cation in a remand proceeding in the same cause, adopting a changed *ratio decidendi* and allowing only a part of the relief earlier awarded to that party, notwithstanding the original adjudication had become final?

2. May a court, consistent with substantive due process, having in an original proceeding finally adjudicated the rights of a party to a charitable grant then found to have vested years earlier under a testator's will, subsequently in a remand proceeding change its interpretation of the 'vesting' provisions of the will so as to then deny that party any entitlement to the accumulated earnings accruing after the vesting date, notwithstanding that the original determination had also upheld that party's pleading which expressly claimed the accrued earnings as a right of present enjoyment and possession which necessarily followed the vesting?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the interpretation of the *Fourteenth Amendment, Section 1* of the Constitution of the United States, reading:

"nor shall any State deprive any person of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

A dispute of several years' duration, involving a number of issues and sub-issues, one of which remains here involved, originally arose between a corporate co-trustee and two individual co-trustees over the disposition of a large charitable trust fund created by the Will of Harold L. Stuart. The individual co-trustees, sisters of the testator, brought the original complaint, together with the ILLINOIS INSTITUTE OF TECHNOLOGY (hereinafter sometimes referred to as "IIT"), against the corporate co-trustee, CON-

TINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO (hereinafter sometimes referred to as "the Bank"). The dispute arose because the individual co-trustees and the corporate trustee were unable to agree upon a plan of distribution of the trust fund. Twenty-seven charitable institutions (hereinafter sometimes referred to as "Intervenors"), all of which were named in the plan of distribution submitted by the Bank (although several were also named in a plan submitted by the individual trustees), were granted leave to intervene in the Circuit Court of Cook County, Illinois, and subsequently opposed the contentions of the individual trustees. That court adopted without essential change the plan of distribution submitted by the Bank in preference to the plan advanced by the individual co-trustees. The Circuit Court's judgment entered November 15, 1974 finding in favor of the Bank and intervenors on counts I, II and III of the second amended complaint on which the case was tried, on appeal was later affirmed in all respects by the Appellate Court (*Northern Trust Company v. Continental Illinois Bank & Trust Co.*, 43 Ill.App.3d 169 (1976)). The Supreme Court of Illinois granted leave to appeal and later, by its opinion entered October 5, 1977 (reported in full at 68 Ill.2d 502 and reproduced in pertinent parts in Appendix A hereto) reversed the Appellate Court as to Counts I and III and affirmed that court as to Count II.

This petition for writ of certiorari relates only to the issue which arose under Count III concerning a charitable grant to IIT of \$3.5 million and IIT's entitlement to accrued earnings thereon after the vesting of the grant on June 30, 1971. Since this petition does not relate to Counts I and II of the original cause, the parts of the opinion of the Supreme Court of Illinois filed October 5, 1977 relating to those non-involved counts are omitted from consideration

herein as not pertinent and, for clarity of understanding of the Justices, are not reproduced in Appendix A hereto.

The Count III Relief and The Proceedings Relating Thereto in Stuart I

The key provisions of the Stuart Will establishing the Stuart Charitable Trust and granting broad distributive discretion to the individual co-trustees and the Bank as corporate trustee, are found in Article Fifth, paragraphs (d) and (e) of the will, reading as follows:

"(d) Until such time as all of the HALSEY, STUART & CO., INC. stock or assets shall have been sold, the Executors acting as Trustees *may in their sole judgment and discretion accumulate the net income of the trust estate and add the same to the principal (provided the accumulations shall not take place for more than (5) years)*, or may from time to time distribute the net income, or such part thereof as the Trustees in their sole judgment and discretion may deem proper, to such qualified charitable organizations as the Trustees may select. (Emphasis supplied)

"(e) Upon the completion of the sale of all stock or assets, as the case may be, of HALSEY, STUART & CO. INC., the net proceeds of such sale *shall, after payment of all expenses of administration and the creation of the trusts for the benefit of my sisters provided for in Article THIRD hereof, be distributed to such qualified charitable organizations as may be selected by my Trustees. Such distribution to qualified charitable organizations shall take place not more than five (5) years after my death. If for any reason it shall not be possible or practicable to complete distribution within that time, the Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such*

charitable organization shall vest at the expiration of such five-year period." (A. 32) (Emphasis supplied)¹

As shown more fully in Appendix D hereto, in Count III of the second amended complaint, IIT pleaded, alternatively, that it possessed a vested right under these will provisions to receive on June 30, 1971 a grant of \$3.5 million to additionally endow and support the Harold L. Stuart School of Management and Finance (for which \$5 million was earlier granted) because the Bank and the two individual trustees had all designated IIT to receive such additional grant within five years following Stuart's death, which period ended June 30, 1971. In that count IIT pleaded and specifically prayed, not only for a decree confirming its right to receive the \$3.5 million principal grant, but also for the increase, gains, income or profits accrued to the vested grant after June 30, 1971. The allegations and prayers for relief of Count III were expressly traversed and denied by the defendant Bank (A. 66) and the intervenors (R.C. 76, 89, 106, 129, 146, and 152) in their respective answers. Such pleadings remained unchanged and in that frame throughout the original case in the Circuit Court, the Appellate Court and the Supreme Court; likewise, throughout the remand cause in the Circuit Court of Cook County and the Supreme Court of Illinois (Stuart II). Thus, the "relief" sought by IIT in Count III at all relevant times expressly included the grant earnings accruing after the vesting on June 30, 1971 as an incident of such "vesting."

In Stuart I the Supreme Court of Illinois upheld IIT's contention that all three co-trustees had made written designations meeting Stuart Will requirements within the

¹ The Abstract of Record filed in the original and remand causes below is referred to by designation (A.) and references to the record, to the extent of material not contained in the abstract, are by designation (R.C.).

five-year period entitling IIT to receive the \$3.5 million grant. This was the basic rationale of the court's original opinion.²

The opinion introduced consideration of the Count III issues with the flat-out, explicit and unqualified adjudication in favor of IIT, reading:

"We determine that the circuit court erred in its denial of the relief requested by plaintiff IIT in Count III of the second amended complaint." (Appendix A, p. A-3)

The Court further stated:

"Article Fifth of Harold Stuart's will provided that if the trust could not be distributed within five years the Executors were to select the charitable beneficiaries in writing prior to the expiration of that period of time. Article Fifth further provided that the interest of the selected charities would vest at the end of the five-year period." (Appendix A, p. A-4) (Emphasis supplied)

Concluding that all trustees had so selected IIT as a charitable beneficiary to receive an additional \$3.5 million grant within the five-year period and that the attempt of the Bank to withdraw its proposal for such additional grant to IIT was arbitrary and unreasonable and hence ineffectual, the Court next found:

"The trustees had, in effect, all proposed the \$8.5 million [including the \$5 million grant originally made] was the minimum amount IIT should receive. The trial court should have accepted this figure as an amount over which the trustees had reached agreement as was specifically stated in the Bank's pleadings. Because

² The opinion of the court filed on October 5, 1977 specifies the documents whereby the individual co-trustees evidenced their written designation of IIT to receive the additional \$3.5 million grant and likewise the written designations of the Bank made by a letter and by its pleadings to the original complaint. (Appendix A, pp. A-3 to A-4)

there was no evidence to suggest that the amount of this grant subsequently became unreasonable or inappropriate, *the circuit court erred in failing to find for IIT as to Count III.* We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT." (Bracketed material and emphasis supplied) (Appendix A, pp. 5, 6)

Subsequently, the only petition for rehearing filed with the Supreme Court of Illinois in Stuart I by intervenor, Museum of Science and Industry, was denied. It did not relate to Count III. The mandate of the Court was thereupon issued on December 2, 1977 adopting and incorporating by reference and attachment the court's opinion of October 5, 1977. (Appendix B, p. B-1) It directed the cause to be remanded to the Circuit Court of Cook County "for modification and further proceedings consistent with the opinion attached to this mandate." (Appendix B, p. B-2) The controversy presented by the instant petition for writ of certiorari then ensued.

Count III Proceedings in The Remand Cause (Stuart II)

Upon remand to the Circuit Court of Cook County, that court entered a modified judgment order conforming to the reversal and affirmance, respectively, of counts I and II of the second amended complaint, as to which no controversy existed on remand; also reversing the trial court's erroneous count III finding in the judgment order of November 15, 1974, which had disallowed the \$3.5 million grant to IIT, by directing the principal amount thereof to be paid to IIT. The trial court, however, left in abeyance and reserved jurisdiction to determine the question of IIT's entitlement to the earnings, increases, gains, income and profits accruing

with respect to the \$3.5 million vested grant and directed a reserve in the sum of \$2.2 million to be held by the trustees pending final disposition of the question of IIT's entitlement to earnings accruing on the vested grant over the more than six years since June 30, 1971 while the cause was in litigation. (A. pp. 108, 112)

The plaintiffs, Elizabeth B. Stuart, as surviving individual co-trustee, and IIT, then concurrently filed a petition for accounting of the trust funds held by the Bank and *inter alia* for an order distributing all the accrued earnings of the \$3.5 million grant to IIT. On motions of the Bank and intervenors and petitioners' reply thereto³ (A. 137), the Circuit Court of Cook County on April 20, 1978 entered its final order of partial dismissal of the petition for accounting, ruling that certain intervenors, not IIT, were to receive the earnings from IIT's \$3.5 million vested grant. (A. 157) From that order Elizabeth B. Stuart, as surviving individual co-trustee, and IIT prosecuted their appeal to the Supreme Court of Illinois, direct review having been granted by the court pursuant to its rules.

³ The inescapable Fourteenth Amendment considerations of due process involved in the trial court's ruling, which denied IIT the earnings on its \$3.5 million vested grant, were unambiguously presented to the Circuit Court of Cook County in the Reply to the Motions to Dismiss the Petition for Accounting, (A. 137, para. 7 of Reply), stating,

"Any distribution of the income, earnings and profits on IIT's vested grant of \$3.5 million to Intervenors or any other than IIT would constitute an obvious violation of the constitutional rights of IIT by depriving it of property without due process of law in violation of § 1 of the Fourteenth Amendment to the United States Constitution . . ."

Following submission of briefs⁴ and oral argument by the parties in the remand cause, the Supreme Court of Illinois filed a divided opinion on January 26, 1979 (Stuart II) whereby the majority affirmed the judgment order of the Circuit Court entered April 20, 1978, denying IIT's claim under Count III to the accrued grant earnings. A dissenting opinion was filed by Mr. Justice Robert C. Underwood, concurred in by Mr. Justice Thomas J. Moran, who upheld IIT's right to the accrued earnings. (Appendix C, pp. C-6 to C-9)

The majority of the court in denying grant earnings to IIT under Count III in Stuart II, while allowing only the principal vested grant of \$3.5 million to stand, also then awarded those grant earnings to other charitable intervenors under what the majority described as the "accumulation excess residue" clause in the original trial court judgment order of November 15, 1974. (A. p. 69) In Stuart II the Supreme Court of Illinois expressed a new rationale of decision not mentioned or relied on in the original opinion, viewing IIT's claim under Count III as now resting upon the equitable discretion of the trial judge, in the

⁴ In its Opening Brief in the Supreme Court of Illinois, IIT again asserted that to deprive IIT of the grant earnings as proposed by the trial court in its order of April 20, 1978 would constitute an unconstitutional deprivation of property without due process. At page 28 the brief asserted, "Such an unlawful distribution of the earnings of the vested grant is a deprivation of property without due process of law in violation of § 1 of the Fourteenth Amendment of the Constitution of the United States . . . /A/s pointed out by the Supreme Court of the United States in *Chicago, Rock Island and Pacific Railway Co., et al. v. United States, et al.*, 284 U.S. 80, 96 (1931). "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." Similarly, in IIT's Reply Brief in Stuart II, IIT devoted § 4 thereof, pages 19 and 20, to a renewal of its insistence that the trial court's order of April 20, 1978 "necessarily amounts to confiscation of property without due process of law in violation of federal and state constitutional provisions."

circumstances of a deadlock between the three trustees, "to formulate a plan of distribution of the entire fund." (Appendix C, p. C-4) The majority now found that *both sides* (Stuart and IIT, on the one hand, as well as the Bank and intervenors on the other) had joined in such an appeal for equitable discretion. This new reasoning, relying on equitable discretion as the basis of the award of the \$3.5 million grant to IIT, found no expression whatever in the original opinion of October 5, 1977, where the court earlier had adjudicated IIT's entitlement to the relief sought in Count III, as following from the fact that *all* of the Stuart trustees had effectively designated IIT prior to June 30, 1971, thereby "vesting" the grant as mandated in Article V, § 1, paragraph (e) of the Stuart will.

The majority opinion in Stuart II is wholly silent with respect to the prior specific adjudications in the original opinion that "the circuit court erred in its denial of the relief requested by plaintiff, IIT, in Count III of the second amended complaint," (Appendix A. p. A-3) and that "the circuit court erred in failing to find for IIT as to Count III." (Appendix A, p. A-6) The opinion of the majority in Stuart II contains no mention of and simply ignores the express allegations in Count III and the prayer for relief, which specifically sought all accrued earnings after the vesting of that grant on June 30, 1971. The dissenting opinion of Mr. Justice Underwood, concurred in by Mr. Justice Moran, points up the disparities between the opinions of October 5, 1977 and January 26, 1979, and sets forth the reasons why in the minds of those justices the original opinion established IIT's entitlement to the grant earnings. (Appendix C, pp. C-6 to C-9)

The court's mandate in Stuart II issued on April 11, 1979. It was recalled on May 7, 1979 on motion of Petitioner IIT pending the timely filing of a petition for writ of certiorari in this Court, and until the Supreme Court of the United States shall have acted upon it.

REASONS FOR GRANTING THE WRIT

Introduction

The due process arguments relied on for issuance of the writ are premised on petitioners' contention that the Supreme Court of Illinois, when called upon to enforce its opinion of October 5, 1977 and related mandate in *Stuart I*, after the opinion had become final, impermissibly shifted its position by adopting a totally changed *ratio decidendi* reversing final adjudications in the original opinion which established IIT's right to the accrued earnings. Those earnings, amounting to approximately \$1.5 million, are now being diverted to intervenors, who were strangers to the Count III vested grant. Accordingly, in this introduction, petitioners respectfully present an explanation of why the original opinion of October 5, 1977 constituted a binding and final adjudication and established, as the law of the case, IIT's entitlement to the grant earnings.

In an early pronouncement of the purposes of the doctrine of *res judicata*, equally applicable today to issues of the instant case, this Court observed in *Johnson Steel Street Rail Co. v. Wharton*, 152 U.S. 252, 38 L.Ed. 429, 14 S.Ct. 608 (1893), at 257:

"The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined. The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject matter, shall not be retried between the same parties in any subsequent suit in any court."

Similarly, in *U.S. v. U.S. Smelting, Refining & Mining Co.*, 339 U.S. 186, 94 L.Ed. 750, 70 S.Ct. 537 (1950), this Court

dealt with the doctrine of "law of the case" ("a kindred rule of the doctrine of *res judicata*"). Petitioners submit that under both of these related doctrines, IIT's right to the disputed earnings was settled in the original opinion.

The Specific Adjudications of "Count III Relief" Made in *Stuart I*

First, in *Stuart I*, IIT's right thereto was indeed "distinctly put in issue" and was "determined by a court of competent jurisdiction" within the meaning of *Johnson Steel* and its progeny. There can be no question concerning the scope of the pleadings under Count III of the second amended complaint, for there IIT twice pleaded for "increases, gains, earnings or profits" on the \$3.5 million grant accruing after June 30, 1971. The record is also clear that those allegations were specifically denied and traversed by the Bank and all intervenors. Consequently, those pleadings were merged into, expressly adjudicated, and the issue of earnings was disposed of in favor of IIT in the October 5, 1977 judgment order and opinion of the Supreme Court of Illinois and its subsequent confirming mandate. In the *Stuart I* opinion, the Court resolved the matter so "put in issue" thus: "We determine that the circuit court erred in its denial of the *relief requested* by plaintiff IIT in Count III of the Second Amended Complaint"; also, in a second like finding: ". . . the circuit court erred in failing to find for IIT as to Count III." (Appendix A, pp. A-3, A-6) (Emphasis supplied)

In neither of these two explicit and unequivocal determinations did the court limit its reference to the Count III "relief requested" only to the principal grant of \$3.5 mil-

lion or eliminate the prayed-for relief of grant earnings.⁵ The quoted words of the court are clear and unambiguous and should be taken as written and to mean what they say; otherwise, court decisions would have no finality or certainty of meaning whatever.

The Original Adjudication of a "Vested Grant" to IIT Under Stuart Will as Pleaded in Count III

Secondly, the opinion of October 5, 1977 initially and correctly sustained the fundamental vesting theory contended for by IIT in Count III, an interpretation of vesting in *present enjoyment* after June 30, 1971 directed by the Stuart Will itself in the case of a grant to a charity like IIT selected by all trustees within the five-year period prescribed in the will. Article V(d) of the will expressly prohibits accumulation of income beyond the five-year period. Selection of IIT by all trustees was expressly found to have occurred by the court in its October 5, 1977 opinion. In fact, a reading of the full opinion of the Stuart Will discloses that IIT was the only

⁵ In the dissenting opinion, Mr. Justice Underwood wrote:

"I believe that it was implicit in our earlier opinion in this case that IIT was entitled to interest on its grant of \$3.5 million. In our October 1977 opinion it was determined 'that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint.' (68 Ill.2d 502, 533). While that opinion did not refer specifically to the question of interest on the \$3.5 million, the relief requested by plaintiff IIT in count III of its second amended complaint included an amount for 'increases, gains, earnings or profits' on the \$3.5 million grant. Since the majority opinion concedes that 'we did not specifically exclude an increase of the IIT grant in the earlier opinion,' it would seem more logical to resolve the ambiguity by referring to the pleadings to determine what relief was requested, since we concluded that the circuit court had erred in its denial of the relief requested by IIT." (Emphasis supplied)

charity selected by the three trustees to receive a vested grant under the specific will provisions. Thus, in Stuart I the court correctly rested its adjudication on the controlling provisions of the will, not on the basis of a discretionary judicial 'parceling-out' of trust funds to IIT. Here again the opinion of the court filed January 26, 1979 is shown to rest upon a totally changed *ratio decidendi*, to the prejudice of IIT's established rights. In so shifting its position, the court in Stuart II, also for the first time, adopted a new interpretation of the Stuart will, defining "vesting" as merely a *designation* of ultimate grantee status, and thus blocked out the economic benefits to IIT during the period required to litigate its entitlement, in this instance, a period of more than six years.

Again, the court's opinion of January 26, 1979 was erroneous in holding that IIT had invoked the equitable discretion of the trial judge by seeking his "formulation of a plan of distribution." That never, in fact, occurred. As correctly found originally in Stuart I and as pleaded in Count III, IIT never sought the accrued earnings as a discretionary "hand-out" from the trial judge, but always rested its claim on the terms of Harold L. Stuart's will. It looked solely to the provisions of that will and the facts originally found by the Supreme Court of Illinois that IIT had been selected by all trustees. The court's shift away from the Will provisions to a theory of judicial discretion in Stuart II was obviously error and should not defeat IIT's rights as finally adjudicated in Stuart I.

The opinion of January 26, 1979 fails to mention, much less to discuss, either of these two basic showings of the binding adjudication in favor of IIT which occurred in the original opinion and the mandate (Appendix B) which accompanied it. Instead, the Court proceeded to plough new ground and embraced new theories of decision. A reading

of the two opinions, as they pertain to Court III relief, particularly the dissenting opinion of Mr. Justice Underwood (concurred in by Mr. Justice Moran), will demonstrate to this Honorable Court that the decision in Stuart II cannot logically co-exist with its forerunner, which had already become final.⁶

The Court's Mistaken Adoption in Stuart II of The Inapplicable "excess residue" Clause

Finally, in changing the *ratio decidendi*, the Court not only excluded IIT from the grant earnings but awarded them to intervenors. This was done under an erroneous application of an unrelated "excess residue" clause written into the November 15, 1974 judgment order of the trial judge. That order could not conceivably have been fashioned to govern disposition of accrued earnings on a grant to IIT since the trial court in the same order *totally denied* all Count III relief. The January 26, 1979 opinion in Stuart II seems to say that even though the trial court then erroneously failed to grant the principal amount of IIT's Count III claim for relief, the trial court, nevertheless, had *correctly and anticipatorily disposed of IIT's claim for accrued earnings.*

This Honorable Court should also note that in the Stuart I opinion the court's comments on the "excess residue" clause (Appendix A, pp. A-7 to A-8) did not relate to the

⁶ It is beyond question that the October 5, 1977 decision of the Supreme Court of Illinois in Stuart I was a final decision. No petition for rehearing was granted. No petition for a Writ of Certiorari from the United States Supreme Court was filed. "It has long been the rule that after thirty days has elapsed, a decree becomes final and the court cannot amend it except as to form." *People v. Lewe*, 380 Ill. 531, 44 N.E.2d 551 (1942). See also *Illinois National Bank of Springfield v. Gwinn*, 390 Ill. 345, 61 N.E.2d 249 (1945).

Count III grant but were in an entirely different setting. Nothing said there logically related to the issue of the Count III entitlement of IIT to accrued earnings on the \$3.5 million vested grant. What was dealt with there was the contention of both the Museum of Science and Industry and IIT that an unexpected enhancement of the Stuart Charitable Trust Fund by millions of dollars after the November 15, 1974 order, warranted at least a review of the equity of the trial court's discretionary distribution plan. In Stuart II petitioners in no way sought to relitigate the court's determination to the contrary involving the excess residue clause nor to relitigate any other issue. They only sought in the remand cause proper enforcement of the court's opinion of October 5, 1977 as it related to Count III.

I. THE OPINION IN STUART II DENYING IIT THE ACCRUED EARNINGS CONSTITUTED AN EVIDENT REWRITING OF THE ORIGINAL OPINION IN VIOLATION OF FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS WHICH ARE BASIC IN OUR SYSTEM OF JURISPRUDENCE.

Petitioners rely upon the long-established common law doctrines of *res judicata* and law of the case which require adherence to final adjudications where the issues and the parties are identical, whether the subsequent litigation occurs in the same court or in another court. The instant application of these settled procedural rules may not be clouded by doctrinal exceptions which are inapposite. Obviously irrelevant are exceptions to *res judicata* or law of the case doctrines involving instances of appellate departure from *stare decisis* or situations involving changes in decisional law subsequently applied in a second appellate proceeding, involving no finality of the original decision; Cf. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364: nor does the instant case present a situation

of newly-considered evidence on an open record in a cause where the original adjudication had not attained finality; *Cf. U.S. v. U.S.S. Melting, Refining & Mining Co.*, 339 U.S. 186, 198-199. Here, more than a year after the point of finality had been passed under settled civil procedure, the court in Stuart II reversed its earlier decision. It referred to no change of decisional law governing interpretation of the Stuart Will, nor to any new interpretation of the controlling pleadings of "vested right" to earnings in Count III.

The rule of law of the case, likewise, cannot be clouded here by the dichotomy in the authorities, some of them hold the rule to be absolute, "right or wrong", even precluding correction of error, others holding that the rule is qualified to the extent of permitting the correction of error by the appellate court in a second review. See Annotation 87 ALR 2d 271, 279-299, *Erroneous Decision as Law of the Case on Subsequent Appellate Review*. It will be noted that there is no suggestion in Stuart II, nor could there be, that the court purported to be pursuing a correction of error in its prior opinion of October 5, 1977.

Petitioners, therefore, submit that the doctrines of *res judicata* and law of the case unqualifiedly apply to what occurred in the cause below and govern resolution of the conflicting and inconsistent opinions of the court relating to the Count III relief sought by IIT.

In raising the federal constitutional questions, petitioners recognize that what is due process of law depends on the circumstances and necessities of a particular situation. One authoritative interpretation, focusing on procedural aspects of due process, particularly applicable to the circumstances and necessities of the instant case, is stated in *Constitution*

of the United States of America, Rev. and Annot., 1972 Edition, page 1406:

"By due process of law is meant one which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." See *Hagar v. Reclamation District*, 111 U.S. 701, 708 (1884); *Hurtado v. California*, 110 U.S. 516, 537 (1884).

It requires no citation of authority to assert that the traditional doctrines of *res judicata* and law of the case are basic procedural principles of our common law inheritance. There are few matters of process of greater importance to the *due administration of justice* than these. Both have long been recognized and given enforcement by this Honorable Court and throughout the American judicial system. These are principles required to achieve settled justice, finality of court resolution and future predictability. These are essential to assure parties who have once placed in issue their civil disputes and obtained determinations thereof by a court of competent jurisdiction that they have, in fact, received their day in court and a resolution of their rights or obligations. *Johnson Steel Street Rail Co. v. Wharton*, *supra*. These rules indeed provide a civil process which is constitutionally "due," precluding a court on second review from ignoring its earlier adjudication.

A litigant has a constitutional right to rely upon the protection afforded by the doctrines of *res judicata*, and law

of the case, which right is protected against violation in any subsequent judicial proceeding. This Court has held that “[A] right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . .” *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897). It has declared that this is the rule “. . . even though the determination was reached upon an erroneous view or by an erroneous application of the law.” *United States v. Moser*, 266 U.S. 236, 242, 45 S.Ct. 66, 67 (1924).

It has recently been held, in a case indistinguishable in principle from the instant case, “that where refusal of a state court to apply *res judicata* in a second proceeding, results in a direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge the owners’ constitutional right to due process.” *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (1978). The circumstance that the offending action is that of a state court does not render the departure from due process any less a federal concern.

In *Shelley v. Kraemer*, 334 U.S. 1, 18, 92 L.Ed. 1161, 68 S.Ct. 836 (1948), this Court noted that the Fourteenth Amendment protections extend to the action of state courts as well as to other state infringements. The Court said:

“The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment’s prohibitory provisions, it has never been suggested

that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.”

There have been other situations in which it has been held that the procedures of state courts violate federal due process. The action of state courts in imposing penalties or depriving parties of other substantive rights, without providing adequate notice and opportunity to defend, has long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). Due process of law, when applied to judicial proceedings, means a course of legal proceedings according to rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). It requires a proceeding which follows forms of law appropriate to the case, and just to the parties affected. *Endicott Co. v. Encyclopedia Press*, 266 U.S. 285 (1924). Procedural due process rights attach where state action condemns a person to “suffer grievous loss of any kind.” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

II. DENIAL IN STUART II OF ILLINOIS INSTITUTE OF TECHNOLOGY’S RIGHT TO THE ECONOMIC BENEFITS AND USE OF ITS GRANT, WHICH ADMITTEDLY HAD VESTED MORE THAN SIX YEARS EARLIER, CLEARLY IS A DEPRIVATION OF SUBSTANTIVE DUE PROCESS.

The newly pronounced interpretation by the majority in Stuart II that “vesting” under the Stuart Will constituted essentially no more than a mere designation of a grant recipient who would take at the end of prolonged litigation ultimately resolved in its favor (carrying with it no present economic benefit or enjoyment after the vesting date

of June 30, 1971),⁷ is both inconsistent with vesting theory originally adopted by the court in Stuart I and contrary to the express mandates of the Harold L. Stuart will as written in Article V(d) (e). This inconsistency between the opinions of October 5, 1977 and January 26, 1979, illustrative of still another violation of the doctrines of *res judicata* and law of the case, is best explained in the dissenting opinion of Mr. Justice Underwood (Moran, J. concurring), as follows:

"More fundamentally, however, it seems contrary to logic and reason to declare, on the one hand, that IIT had a vested right to the \$3.5 million grant as of June 30, 1971, but on the other hand to deny IIT any right to the interest which accrued on this grant during the subsequent course of this protracted litigation. The result reached by the majority seems especially unsound when one considers article V(e) of the Stuart will, which provides:

'/T/he Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization *shall vest at the expiration of such five-year period.*' (Emphasis added.)

Since IIT was selected as a charitable organization to take under the will within the 5-year period immediately following the testator's death on June 30, 1966,

⁷ Since no accounting of the accrued earnings over 6 years on the \$3.5 million vested grant has as yet been allowed, it could only be estimated in the court below that the amount of accrued earnings at issue ranges between \$1,250,000 and \$1,500,000, although a reserve fund continues to be held in the amount of \$2,200,000. (IIT's Opening Brief in Stuart II, p. 8)

its interest 'vested' on June 30, 1971, pursuant to the express terms of the will."

* * * * *

"Article V(d) of the Stuart will, which the majority opinion fails to discuss, provides as follows:

'The executors acting as trustees may, in their sole judgment and discretion, accumulate the net income of the trust estate and add the same to principal (*provided the accumulations shall not take place for more than five years*), or may from time to time distribute the net income, or such part thereof, as the trustees in their sole judgment and discretion may deem proper, to such qualified charitable organizations *as the trustees may select.*' (Emphasis added.)

This clause, to me, demonstrates the testator's intent that accumulations of net income may be added to the general residue of the trust estate only for the 5-year period immediately following the testator's death. The only reasonable interpretation of this clause, when read in conjunction with article V(e) is that the testator intended the charitable organizations designated within the prescribed 5-year period to come into present enjoyment and possession of their grants on June 30, 1971. After that date, any accumulation of interest would belong, as of right, to the appropriate designated charity and could not be added to the general residue of the trust estate."

Petitioners do not ask this Honorable Court to involve itself in a resolution of a state issue of will construction. However, petitioners do assert that once the court below, in its original opinion of October 5, 1977, determined the issue of entitlement to the accrued earnings as specifically pleaded by IIT in Count III, the court thereafter had no authority, constitutionally, to adopt a different and altered theory of "vesting", when it was asked to enforce its original mandate in Stuart II. As shown in Appendix D hereto, ex-

pressly placed in issue in the original cause was the question of whether earnings accruing on a vested grant after June 30, 1971 necessarily accompanied the grant *as an incident of vesting*. Thus, Count III of the Second Amended Complaint in paragraph 17, pleaded the following:

"The aforesaid conjoint written selections and designations of IIT by all trustees to receive the further sum of \$3,500,000 from the trust estate occurred within five (5) years following the death of Harold L. Stuart and accordingly under the provisions of Article FIFTH (e) of the Will, the additional grant of \$3,500,000 to IIT became vested and indefeasible and in equity was funded. As soon as practical after June 30, 1971, the fifth anniversary of decedent's death, it was and became the duty of the trustees to pay said additional sum of \$3,500,000 to IIT together with any increase, gains, earnings or profits, which have been received or accrued with respect to that fund after June 30, 1971." (Appendix D, pp. 7-8)

Accordingly, there can be no doubt that the meaning of vesting in the Stuart Will was placed at issue before the court and finally resolved by it in the original cause when it found that the trial court had "erred in its denial of the relief requested by plaintiff IIT in Count III."

The diversion of the large sum of grant earnings from IIT to intervenors as would result from the court's decision of January 26, 1979, necessarily constitutes a deprivation of property without due process of law in violation of § 1 of the Fourteenth Amendment. *Sotomura v. County of Hawaii, supra.* As pointed out by this Court in *Chicago Rock Island and Pacific Railway Co., et al. v. United States, et al.*, 284 U.S. 80, 96 (1931), "confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." See also *Chicago, Minneapolis and St. Paul Railway Co. v. Minnesota*, 134 U.S. 418, 458; *Reagan v. Farmer's Loan & Trust Co.*, 154 U.S. 362,

412; Chicago, Minneapolis and St. Paul Railway Co. v. Wisconsin, 238 U.S. 491.

It has been similarly recognized in eminent domain cases that the constitution requires that the landowner be compensated for the use of his property for the period between the taking of the property and the actual payment of compensation therefor. In *United States v. 355.70 Acres of Land, etc.*, 327 F.2d 630, 632 (3rd Cir. 1964), a landowner sought interest on the value of his condemned property from the time of the taking until time of actual payment of compensation. In reversing the trial court's denial of his claim for interest, the court noted:

"In deciding what is just compensation for a public taking of private property, courts normally determine and award the fair value of the property at the time of the taking. But usually the taking occurs at the beginning of the condemnation proceeding, while the award comes at the end. This means that there is likely to be a substantial period during which the owner has neither his land nor equivalent value in money. In such circumstances, *just compensation must include, in addition to fair value at the time of taking, an award for the intervening deprival*. To supply this essential element of just compensation, Congress has required that the United States pay 6 per cent interest upon the value at taking from that date until the award is made and paid." 40 U.S.C. § 258(a). (Emphasis added.)

There could be no clearer illustration of an arbitrary and unreasonable taking of the use of property without compensation than the trial court's order of April 20, 1978, upheld by the judgment and opinion of the Supreme Court of Illinois entered January 26, 1979, which takes from IIT the full economic value and use of a \$3.5 million fund over a period of more than six years, being the time required to litigate the issues of Count III and to vindicate IIT's rights, in the face of resistance presented throughout the case by the defendant Bank and intervenors.

CONCLUSION

For the reasons stated above, Petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE

SUPREME COURT OF ILLINOIS

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

*Plaintiffs-Appellants,
vs.*

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased.

Defendant-Appellee,

CHICAGO HISTORICAL SOCIETY, et al.,
Intervenors, Defendants-Appellees.

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County, the Hon. Francis T. Delaney, Judge, presiding.

OPINION FILED OCTOBER 5, 1977—REHEARING DENIED NOVEMBER 23, 1977

MR. JUSTICE RYAN delivered the opinion of the court:

This appeal involves a dispute between a corporate co-trustee and two individual co-trustees concerning the disposition of a large charitable trust fund created by the will of Harold L. Stuart. The individual co-trustees, the sisters of the late Harold L. Stuart (hereinafter referred to as the Stuart sisters), brought the original complaint together with a co-plaintiff, the Illinois Institute of Technology (hereinafter referred to as IIT), against the corporate co-trustee, the Continental Illinois National Bank and Trust Company (hereinafter referred to as the Continental Bank).

The dispute arose because the individual co-trustees and the corporate trustee were unable to agree upon a plan of distribution. Additionally, 27 charitable organizations, which were named in the plans of distribution submitted by the co-trustees, were granted leave to intervene in the lower court. The circuit court of Cook County essentially adopted the plan of distribution submitted by the corporate co-trustee in preference to the scheme of distribution advanced by the individual co-trustees. The circuit court's judgment was affirmed in all respects by the appellate court. (*Northern Trust Co. v. Continental Illinois National Bank & Trust Co.* (1976), 43 Ill. App. 3d 169). We granted leave to appeal pursuant to our Rule 315(a) (58 Ill. 2d R. 315(a)) and now affirm the decision of the appellate court in part, and reverse that decision in part.

The facts involved in the present appeal are lengthy and complex. A full statement of the facts is included in the opinion of the appellate court, and we shall set out only those facts necessary for an understanding of our disposition of this case.

Harold L. Stuart died on June 30, 1966. He was unmarried and was survived by his two unmarried sisters. He was a renowned financier and investment banker and was the president and sole stockholder of the investment banking firm of Halsey, Stuart and Co., Inc. All parties agree that Harold Stuart was devoted to the city of Chicago, and that his lifelong desire was to build the city into a financial center. The testator left a multimillion dollar estate which presently is valued in excess of \$26 million.

Harold Stuart's will was executed on April 23, 1964. It named the Continental Bank and his two sisters as co-executors and co-trustees. The will provided for the crea-

tion of two \$1 million trust funds to provide life estates for each sister with the remainders to charity. The remainder of his estate was to be distributed to qualified charitable organizations. The will did not mention specific charities, but rather vested the discretion to select charitable beneficiaries in the co-trustees. Under the will, the trustees were to select these charities within 5 years of the testator's death.

* * * *

[Substantial portions of the court's opinion, at this point, relating to issues under counts I and II have been omitted for the convenience of the Justices. Should it be found desirable by them to examine these omitted portions the attention of the Justices is respectfully invited to the reports at 68 Ill.2d 502, 512 to 533; 369 N.E.2d 1262, 1266 to 1267].

We determine that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint. In that count, IIT asserted a vested right to an additional \$3.5 million of the estate. The facts relevant to this issue may be briefly restated. A formal "Statement of Intent" dated October 10, 1968, was signed by the Stuart sisters designating IIT to receive \$8.5 million. Subsequently, \$5 million was distributed to IIT, but the Stuart sisters never ceased their efforts to have that institution receive a greater amount. In a letter dated October 7, 1970, the bank designated IIT to receive an additional \$3.5 million as part of a total plan of distribution. This letter read in pertinent part:

"1. Increase the trust's present commitment to the Illinois Institute of Technology by an additional \$3,500,000 (To be used for endowment and Chicago-Kent College of Law. This raises the total commitment to IIT to \$8,500,000, the amount you originally suggested.)"

This letter was by coincidence drafted on the same date that IIT and the Stuart sisters filed their original complaint. In its answer to the complaint filed November 9, 1970, the bank reiterated this proposal, stating that "at the present time there is a disagreement among the trustees insofar as defendant proposes a total gift of \$8.5 million to IIT while the individual trustees demand a grant to IIT equal to three-quarters of the available trust assets." The bank also prayed that the court direct distribution in accordance with its plan which included a total grant to IIT of \$8.5 million. On June 15, 1971, the bank withdrew this proposal in a letter to the Stuart sisters. At the time of the sisters' final proposal of three-quarters of the estate to IIT, the bank had advised the sisters that approximately \$9 million would be available for distribution.

Article Fifth of Harold Stuart's will provided that if the Trust could not be distributed within 5 years the executors were to select the charitable beneficiaries in writing prior to the expiration of that period of time. Article Fifth further provided that the interests of the selected charities would vest at the end of the 5-year period. IIT contends that the sisters' "Statement of Intent" of October 10, 1968, and the bank's letter of October 7, 1970, constitute a written designation of IIT as the beneficiary of an \$8.5 million grant. The appellate court rejected this argument, reasoning that there had been no simultaneous selection of IIT to receive \$8.5 million, and that there was no "meeting of the minds" because the sisters had designated IIT for three-quarters of the estate. 43 Ill. App. 3d 169, 198-99.

We initially note that resolution of this issue does not call for a resort to the niceties of contract law rules concerning offer and acceptance. It is apparent from the record before us that all three trustees had designated IIT

as the recipient of at least \$8.5 million by the time this unfortunate controversy reached the courts. As its own pleadings indicate, at the time the suit was filed the bank proposed an \$8.5 million grant to IIT. The only disagreement stemmed from the fact that at that time the Stuart sisters had designated IIT to receive three-quarters of the available estate. The bank's decision to withdraw its proposal for an additional grant to IIT did not occur until some time after this litigation had commenced.

Our review of the record leads us to the inescapable conclusion that the bank withdrew its earlier proposal because of the then pending litigation and because the Stuart sisters would not endorse its total plan of distribution. The testimony of the bank officer charged with the overall supervision of the trust reveals no reason for the bank's withdrawal of the additional grant to IIT except that it was precipitated by the sisters' refusal to assent to the bank's total demands. Additionally, the bank officer could not recall the reason that certain of the other grants had been raised after the additional \$3.5 million to IIT was withdrawn. These increased grants, together with several new gifts, were roughly comprised of the amount previously earmarked for IIT. In short, no evidence was offered to support the reduction in IIT's designation.

From the record before us, we can only determine that the bank's withdrawal of its proposal for an additional grant to IIT was arbitrary and unreasonable. The trustees had, in effect, all proposed that \$8.5 million was the minimum amount IIT should receive. The trial court should have accepted this figure as an amount over which the trustees had reached agreement, as was specifically stated in the bank's pleadings. Because there was no evidence to suggest that the amount of this grant subsequently became un-

reasonable or inappropriate, the circuit court erred in failing to find for IIT as to count III. We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT.

* * * *

[That portion of the opinion which is omitted at this point, concerns a grant to intervenor Chicago Historical Society, which is not pertinent to the issues herein. Once again the Court's attention is respectfully directed to the full opinion at 68 Ill. 2d 502, 536 to 537; 369 NE 2d 1262, 1277 to 1278, for the omitted portion.]

The Museum of Science and Industry, an intervenor, contends that the trial court's judgment is against the manifest weight of the evidence in that the museum is limited to a gift of \$50,000, and, as a group 3 charity under the bank's plan, is prevented from sharing in the residual amount of the estate. The museum contends that, due to its size and the extent of its operations, it should be classified as a group 1 charity under the bank's approved plan rather than as a group 3 charity. Evidence was introduced to demonstrate that the museum is a far more sizeable institution than the other charities which comprise group 3.

Although the evidence shows that the Museum of Science and Industry is similar in many respects to some institutions listed as group 1 charities, we cannot find that the listing of this institution as a group 3 charity is against the manifest weight of the evidence. The record reflects that the testator had visited the museum a limited number of times and had only a limited contact with and a general interest in this institution.

We next consider plaintiffs' contentions in regard to the allocation of the \$6.5 million of funds in excess of the specific dollar amount of the court-approved plan. Plaintiffs contend that we should, at the least, direct that the circuit court conduct new proceedings and frame a scheme of dis-

tribution for the additional funds. Under the particular facts of the case, we find no reason to do so.

Under the court-approved plan, charities listed under groups 1 and 2 are to share in the excess funds on a *pro rata* basis. We find this aspect of the plan to be supported by the evidence. With the exception of the Museum of Science and Industry, only smaller charities with minimal contact with testator's sphere of interest were included in group 3. IIT is the only other charity which is precluded from taking a *pro rata* share of the excess funds, and the court could well have concluded that IIT's share of the estate was already of sufficient size. We cannot say that the circuit court's adoption of this aspect of the bank's plan is inequitable or contrary to the manifest weight of the evidence.

We finally consider whether the court awarded excessive or unwarranted attorneys' fees and trustee fees to the Stuart sisters. This issue is raised by a number of the charitable intervenors. The circuit court granted specific fees to the sisters and their attorneys following a special hearing on the matter, and the appellate court affirmed.

The facts relevant to this issue are fully stated in the opinion of the appellate court. (43 Ill. App. 3d 169, 202-03). We shall restate only those facts deemed necessary to an understanding of our disposition of this issue. Intervenors basically contend that the Stuart sisters had no authority to employ counsel or to charge the trust estate for such fees. It is also alleged that the attorneys' services were performed for the benefit of IIT rather than the sisters, and, thus, are not chargeable to the estate. We do not agree and therefore affirm the judgments of the circuit and appellate courts.

The determination of the need for attorneys' fees and the amount of such fees is a decision which rests in the discre-

tion of the trial court. (*Ingraham v. Ingraham* (1897), 169 Ill. 432, 471-72). The trial court did not abuse its discretion by finding that the Stuart sisters justifiably retained counsel and commenced the present litigation. The trustees were hopelessly deadlocked over the manner in which they should discharge their duties as trustees, and resort to the courts was necessary to resolve the impasse. Where, as here, the litigation is the result of honest differences of opinion, attorneys' fees and litigation expenses will be chargeable to the estate. (*Orme v. Northern Trust Co.* (1962), 25 Ill. 2d 151, 165.) We hold that the trial court did not abuse its discretion by charging attorneys' fees and expenses incurred by the Stuart sisters to the estate or by approving the payment of trustee fees to the individual co-trustees.

Nor do we accept the intervenor's contention that the estate was charged for services performed on behalf of IIT. This contention stems from the fact that the same attorney represented both IIT and the Stuart sisters for a period of approximately 2 years. The attorney withdrew as counsel for IIT before the actual trial of the case. As the appellate court noted, the trial judge was aware of this period of dual representation and suggested that the fees be distributed between the sisters and IIT. Thereafter, a substantial reduction in the requested fees was made. We, therefore, hold that the trial court did not abuse its discretion in regard to the allocation of the fees and expenses incident to this litigation.

The judgments of the circuit court of Cook County and of the appellate court are affirmed in part and reversed in part, and the cause is remanded for modifications and further proceedings consistent with this opinion.

*Affirmed in part and reversed in part
and remanded, with directions.*

APPENDIX B

UNITED STATES OF AMERICA

STATE OF ILLINOIS }
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and seventy-seven, within and for the State of Illinois.

| | | |
|--|-----------------------------|-------------------------------|
| PRESENT: DANIEL P. WARD, CHIEF JUSTICE | JUSTICE ROBERT C. UNDERWOOD | JUSTICE JOSEPH H. GOLDENHERSH |
| JUSTICE HOWARD C. RYAN | JUSTICE WILLIAM G. CLARK | JUSTICE THOMAS J. MORAN |
| WILLIAM J. SCOTT, ATTORNEY GENERAL | LOUIE F. DEAN, MARSHAL | JUSTICE JAMES A. DOOLEY |

ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 5th day of October, A.D. 1977, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

The Northern Trust Company, as executor of the Estate of Harriet F. B. Stuart, deceased, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, Elizabeth B. Stuart, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, and Illinois Institute of Technology, a not-for-profit corporation, Elizabeth B. Stuart, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, and Illinois Institute of Technology, a not-for-profit corporation,

Appellants,

No. 49070

vs.

Continental Illinois National Bank and Trust Company of Chicago, a national banking association, not individually but as a co-executor and as a co-trustee under the Last Will and Testament of Harold L. Stuart, Deceased, Museum of Science and Industry, The Art Institute of Chicago, De Paul University, Northwestern University, Field Museum of Natural History, The American Red Cross, The Orchestral Association, Children's Memorial Hospital, Mercy Hospital and Medical Center, Rush-Presbyterian-St. Luke's Hospital, Lyric Opera of Chicago, Chicago Boys Clubs, The Salvation Army-Chicago Chapter, YMCA of Metropolitan Chicago, and Chicago Historical Society, et al.,

Appeal from
Appellate Court
First District
62037
70 CH 4196

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the records and proceedings of the Appellate Court for the First District and the Circuit Court of Cook County, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the records and proceedings aforesaid, and in the rendition of the judgments of the Appellate Court for the First District and the Circuit Court of Cook County, there is manifest error.

THEREFORE, it is considered by the Court that for that error and others in the records and proceedings aforesaid, the judgments of the Appellate Court for the First District and the Circuit Court of Cook County, in this behalf rendered, BE AFFIRMED IN PART AND REVERSED IN PART in the respects set out in the opinion of this Court, and that this cause be remanded to the Circuit Court of Cook County for modifications and further proceedings consistent with the opinion attached to this mandate.

And it is further considered by the Court that the said appellants recover of and from the said appellees costs by them in this behalf expended, to be taxed and that they have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 2nd day of December, A.D. 1977.

CLELL L. WOODS
Clerk,

Supreme Court of the State of Illinois.

APPENDIX C

IN THE

SUPREME COURT OF ILLINOIS

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Plaintiffs-Appellants,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased.

Defendant-Appellee,

CHICAGO HISTORICAL SOCIETY, et al.,

Intervenors, Defendants-Appellees.

Appeal from the Circuit Court of Cook County, Illinois Chancery Division No. 70 CH 4196, there heard on remand from the Supreme Court of Illinois, Nos. 49070 and 49074 Consolidated

Honorable Francis T. Delaney Circuit Judge Presiding

OPINION FILED JANUARY 26, 1979—REHEARING DENIED MARCH 30, 1979.

MR. JUSTICE RYAN delivered the opinion of the court:

This appeal is a sequel to *Stuart v. Continental Illinois National Bank & Trust Co.* (1977), 68 Ill. 2d 502. Upon remand by that opinion, Elizabeth Stuart and the Illinois Institute of Technology (hereinafter IIT) sought to recover "increases, gains, income or profits" accumulating after June 30, 1971, on the \$3.5 million granted IIT by the earlier opinion of this court. The circuit court of Cook County dismissed the petition and ruled that only the \$3.5 million should be distributed to IIT.

The primary issue posed now by Miss Stuart and IIT is whether our earlier opinion gave IIT a right to interest, dating from June 30, 1971, on its grant of \$3.5 million. We

hold that the \$3.5 million grant is the total amount to which IIT is entitled.

The protracted litigation involving the will of Harold Stuart has been recounted in earlier proceedings (see 68 Ill. 2d 502; *Northern Trust Co. v. Continental Illinois National Bank & Trust Co.* (1976), 43 Ill. App. 3d 169), and this particular appeal does not require a complete restatement of those facts. Harold Stuart died on June 30, 1966, leaving a substantial estate. His will provided for the creation of a large charitable trust, with his two sisters and the Continental Bank as trustees. The trustees had the power to designate the charities to whom the assets of the estate would be distributed. Under the provisions of that trust, the bank could veto any distribution ordered by the two sisters. The trustees were unable to agree on a distribution plan, so the circuit court was called on to establish a plan of distribution. The court adopted almost the entire plan submitted by the bank. The two sisters had requested that three-fourths of the trust go to IIT, while the plan approved by the court called for much wider distribution.

In our earlier opinion we examined three major issues relevant to this appeal. First, we found that the bank had wrongfully distributed \$250,000 to an unqualified charity, and we ordered the money returned, with interest, to the trust. Second, we found that the bank and the two sisters had both designated an additional distribution of \$3.5 million to IIT. We ordered disbursement of that amount to IIT. Third, we found that any excess funds should be distributed according to the plan as set forth by the circuit court. Our opinion had, accordingly, dealt with all funds available for distribution. We remanded that case for entry of appropriate orders.

On the remand, Miss Stuart and IIT filed a petition for accounting which asked the bank to supply information on all increases, gains, income or profits, accruing after June

30, 1971, on the \$3.5 million, and asked that an order be entered directing the bank to distribute that money to IIT. The circuit court dismissed that petition and a direct appeal under Rule 302(b) (58 Ill. 2d R. 302(b)) was granted.

In the earlier opinion of this court, it was clearly stated:

"We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT." (*Stuart v. Continental Illinois National Bank & Trust Co.* (1977), 68 Ill. 2d 502, 536.)

It is impossible to negate every possible issue in an opinion and therefore the rule is that "[w]here *** the directions of a reviewing court are specific, a positive duty devolves upon the court to which the cause is remanded to enter an order or decree in accordance with the directions contained in the mandate. Precise and unambiguous directions in a mandate must be obeyed." (*Thomas v. Durchslag* (1951), 410 Ill. 363, 365.) While we did not specifically exclude an increase of the IIT grant in the earlier opinion, neither did we include it, and we specifically directed that \$3.5 million be distributed to IIT. In contrast, our earlier opinion specifically provided for interest on the \$250,000 the Continental Bank would be required to return to the trust (68 Ill. 2d 502, 526). The circuit court followed our instructions and was correct in dismissing a claim for additional funds.

Our earlier opinion effectively distributed all the proceeds of the Stuart trust. On that appeal, IIT contended that the trial court, in adopting its plan for distribution, had erred in not including IIT in the *pro rata* distribution of \$6.5 million of the funds in excess of the amount required to satisfy all specific grants. Monies in excess of the specific grants were ordered to be distributed to designated group 1 and group 2 charities, as established in the distribution plan, on a *pro rata* basis. We specifically

limited IIT's grant to \$3.5 million by holding that they were to receive none of the excess funds. As we stated, "IIT is the only other charity which is precluded from taking a *pro rata* share of the excess funds, and the court [the initial trial court] could well have concluded that IIT's share of the estate was already of sufficient size." (68 Ill. 2d 502, 538.) The \$6.5 million included interest or earnings that could well have been attributed to the \$3.5 million which this court held should be distributed to IIT. When the matter was presented to the circuit court for a plan of distribution, the \$3.5 million was not a segregated fund but was a part of the total assets of the estate, for which the court was asked to form a plan of distribution. Plaintiffs had, at one time, stated in writing that IIT should receive \$3.5 million in addition to that which had previously been distributed to it. However, when that amount was agreed to by the bank, plaintiffs insisted that IIT should receive three-fourths of the total estate. Although in our previous opinion we characterize the bank's action of withdrawing its proposal of the additional grant as "arbitrary and unreasonable" (68 Ill. 2d 502, 536), it should be noted that, at the time of the withdrawal, plaintiffs did not agree to a distribution to IIT of only an additional \$3.5 million. The court was then called upon by *both* parties to formulate a plan of distribution of the entire fund. This the court did, excluding IIT from any share in the accumulated excess. Our opinion stated that we could not say that the circuit court's holding in adopting this plan was inequitable or contrary to the manifest weight of the evidence. The present contention of the plaintiffs is, in effect, asking this court to reconsider at least a part of the distribution plan which we have previously approved.

IIT suggests that our finding that "the circuit court erred in its denial of the relief requested by plaintiff IIT in count

III" (68 Ill. 2d 502, 533) gave IIT a vested right to the \$3.5 million retroactive to June 30, 1971. IIT argues that because it had a vested right to the money, it had a right to the accumulated interest on that money. In particular, it relies on article V(e) of the Stuart will, which provides:

"[T]he Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization shall vest at the expiration of such five-year period."

Harold Stuart died on June 30, 1966, thus making June 30, 1971, the date of "vesting."

The term "vest" does not have a single, fixed, clear and precise meaning. Whether found in a statute or in a document, the word must be construed with reference to, and take its meaning from, the context of the provision where it is found. It may be used "when there is an immediate right to present enjoyment or a present fixed right of future enjoyment" of property. (2 W. James, Illinois Probate Law & Practice sec. 43.74, at 50 (1951). See also *Pearson v. Hanson* (1907), 230 Ill. 610, 617; 92 C.J.S. 1002 (1955).) Once the designation had been made by the Stuart sisters and the bank, the interest became fixed or "vested" and could not be altered by the bank's subsequent withdrawal of the proposal, or by the plaintiffs' rejection of the \$3.5 million grant and their demand for a grant to IIT of three-fourths of the estate. However, in the context of the will, the enjoyment of the fixed or vested interest was to be delayed until distribution. Because of the litigation wherein both parties requested the court to approve plans for distribution, the right to the enjoyment of the \$3.5 million was delayed until the lower court ordered distribution upon remand. "Vest," as used in the Stuart will, meant

only that once the designation had been made, it could not be withdrawn. IIT was given a present fixed right to future enjoyment upon distribution, not a present possessory interest. The vested interest of IIT did not carry with it the right to interest on the amount of the grant from June 30, 1971.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

MR. JUSTICE UNDERWOOD, dissenting:

I believe that it was implicit in our earlier opinion in this case that IIT was entitled to interest on its grant of \$3.5 million. In our October 1977 opinion it was determined "that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint." (68 Ill. 2d 502, 533.) While that opinion did not refer specifically to the question of interest on the \$3.5 million, the relief requested by plaintiff IIT in count III of its second amended complaint included an amount for "increases, gains, earnings or profits" on the \$3.5 million grant. Since the majority opinion concedes that "we did not specifically exclude an increase of the IIT grant in the earlier opinion," it would seem more logical to resolve the ambiguity by referring to the pleadings to determine what relief was requested, since we concluded that the circuit court had erred in its denial of the relief requested by IIT.

More fundamentally, however, it seems contrary to logic and reason to declare, on the one hand, that IIT had a vested right to the \$3.5 million grant as of June 30, 1971, but on the other hand to deny IIT any right to the interest which accrued on this grant during the subsequent course of this protracted litigation. The result reached by the

majority seems especially unsound when one considers article V(e) of the Stuart will, which provides:

"[T]he Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization shall vest at the expiration of such five-year period." (Emphasis added.)

Since IIT was selected as a charitable organization to take under the will within the 5-year period immediately following the testator's death on June 30, 1966, its interest "vested" on June 30, 1971, pursuant to the express terms of the will.

Despite this fact, the majority opinion concludes that this vested right only entitles IIT to the principal amount of \$3.5 million upon distribution, following the termination of this lengthy litigation. This view is based upon what I believe to be an overly restrictive interpretation of the word "vest." The majority opinion concludes that IIT's vested interest gave it a "present fixed right to future enjoyment upon distribution" and only guaranteed IIT that once it had been designated as a charitable organization to receive under the will, such designation could not be withdrawn.

I find it difficult to accept such an inequitable construction of the Stuart will. I concede that the word "vest" may have a different meaning depending on its legal context, but I would contend that there is no basis in the language of the will for the conclusion reached by the majority. On the contrary, I think that a careful analysis of the Stuart will reveals that the testator used the word "vest" in the usual sense of an immediate right to present enjoyment.

Article V(d) of the Stuart will, which the majority opinion fails to discuss, provides as follows:

"The executors acting as trustees may, in their sole judgment and discretion, accumulate the net income of the trust estate and add the same to principal (*provided the accumulations shall not take place for more than five years*), or may from time to time distribute the net income, or such part thereof, as the trustees in their sole judgment and discretion may deem proper, to such qualified charitable organizations *as the trustees may select.*" (Emphasis added.)

This clause, to me, demonstrates the testator's intent that accumulations of net income may be added to the general residue of the trust estate only for the 5-year period immediately following the testator's death. The only reasonable interpretation of this clause, when read in conjunction with article V(e), is that the testator intended the charitable organizations designated within the prescribed 5-year period to come into present enjoyment and possession of their grants on June 30, 1971. After that date, any accumulation of interest would belong, as of right, to the appropriate designated charity and could not be added to the general residue of the trust estate.

Clearly, if the executors had been successful in designating the charities to take under the will and the proportion each was to receive pursuant to article V(e), there would be no doubt that under article V(d) any further accumulations of income prior to distribution would accrue to the benefit of the appropriate charity. The fact that the executors failed to reach agreement prior to June 30, 1971, on the charitable organizations, other than IIT, to take under the will should not operate to deprive IIT of interest that it would otherwise have been indisputably entitled to. The prohibition in article V(d) against accumulations of net income subsequent to the "vesting" date of June 30, 1971,

reinforces my belief that the testator used the word "vest" to connote present enjoyment and possession, including the right to receive all "increases, gains, earnings or profits" accruing after the vesting date. I would allow IIT interest on the \$3.5 million from the date of vesting, June 30, 1971.

MR. JUSTICE MORAN joins in this dissent.

APPENDIX D

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

HARRIET F. B. STUART, not individually,
but as a co-executor and as a co-trustee under
the Last Will and Testament of Harold L.
Stuart, deceased, ELIZABETH B. STUART,
not individually but as a co-executor and as a
co-trustee under the Last Will and Testament
of Harold L. Stewart, deceased, and ILLI-
NOIS INSTITUTE OF TECHNOLOGY, a
not-for-profit corporation,

Plaintiffs,

No. 70 CH 4196

vs.

CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY OF CHI-
CAGO, a national banking association, not in-
dividually but as a co-executor and as a co-
trustee under the Last Will and Testament of
Harold L. Stuart, deceased,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs HARRIET F. B. STUART and ELIZABETH
B. STUART, not individually but as co-executors and as
co-trustees under the Last Will and Testament of Harold
L. Stuart, deceased, by their attorneys, SCHIFF HARDIN
WAITE DORSCHEL & BRITTON, and ILLINOIS IN-
STITUTE OF TECHNOLOGY ("IIT"), a not-for-profit
corporation, by its attorneys, WITWER, MORAN &
BURLAGE, having first obtained leave of Court, complain
of defendant CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY OF CHICAGO, a na-
tional banking association, not individually but as a co-

executor and a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, as follows:

• • • •

[Counts I & II are omitted as not relevant herein.]

COUNT III

Plaintiff, ILLINOIS INSTITUTE OF TECHNOLOGY, ("IIT"), a not-for-profit corporation, hereby pleads alternatively, amending the Amended Complaint by adding separate alternate Counts, designated Counts III and IV.

1-12. Plaintiff incorporates by reference paragraphs 1 through 12, inclusive, of Count II as paragraphs 1 through 12, respectively, of this Count III.

[Paragraphs 1 through 12, as so incorporated,
are as follows:]

1. On April 23, 1964, decedent Harold L. Stuart (sometimes hereinafter referred to as "the decedent") executed his Last Will and Testament (the "Will"), a copy of which is attached hereto as Exhibit A.

2. Harold L. Stuart died in Chicago, Illinois, on June 30, 1966. The Will was admitted to probate on August 29, 1966, in the Circuit Court of Cook County, Illinois. The defendant, CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association with its principal place of business located in Cook County, Illinois (hereinafter sometimes referred to as the "corporate trustee") is duly qualified and acting co-executor and co-trustee under the Will. Plaintiffs HARRIET F. B. STUART and ELIZABETH B. STUART, sisters of the decedent (hereinafter referred to as the "family trustees") are also duly qualified and acting co-executors and co-trustees under the Will.

3. On March 10, 1967, the inventory and appraisement of the estate of Harold L. Stuart, showing assets in the amount of \$33,694,383.35 was filed in the Circuit Court of Cook County, Illinois.

4. The situs of the property of the estate has been at all times and still is in Cook County, Illinois.

5. The Will provides that after payment of certain expenses, the distribution of certain bequests and the creation of certain trusts, as provided in Articles FIRST through THIRD, the remainder of the estate of Harold L. Stuart is to be held in trust (the "Trust") and distributed to "qualified charitable organizations", as defined in Article FOURTH of the Will, by the executors and trustees. The amount available for distribution to qualified charitable organizations pursuant to the provisions of the Will was approximately \$20,000,000.

6. Article FIFTH (e) of the Will provides that the selection of qualified charitable organizations pursuant to the terms of the Will shall take place not more than five years after the death of decedent; that is to say, June 30, 1971. Article FIFTH (e) provides as follows:

"(e) Upon the completion of the sale of all stock or assets, as the case may be, of HALSEY, STUART & CO., INC., the net proceeds of such sale shall, after payment of all expenses of administration and the creation of the trust for the benefit of my sisters provided for in article THIRD hereof, be distributed to such qualified charitable organizations as may be selected by my Trustees. Such distribution to qualified charitable organizations shall take place not more than five (5) years after my death. If for any reason it shall not be possible or practicable to complete distribution within that time, the Executors shall, prior to the expiration of such period of five (5) years after my death, select in writing the qualified charitable organizations to take hereunder and the proportion of my estate each such organization is to receive, and the interest of each such charitable organization shall vest at the expiration of such five year period."

7. Prior to August 1, 1966, charitable organizations began submitting proposals to the trustees for favorable action by the trustees in selecting the distributees of the Trust corpus.

8. IIT is a not-for-profit corporation organized and existing under the laws of the State of Illinois. IIT is a university offering instruction and conferring baccalaureate, graduate, and professional degrees in the fields of engineering, law, finance and the arts and sciences. IIT's enrollment consists of approximately 3,000 full-time and approximately 4,500 part-time students who attend facilities located primarily in the City of Chicago, Cook County, Illinois. IIT is a "qualified charitable organization" within the meaning of Article FOURTH of the Will.

9. On or about February 9, 1967, HARRIET F. B. STUART, on behalf of the family trustees, contacted IIT and expressed the interest of the family trustees in IIT as a beneficiary of the trust estate.

10. On or about May 29, 1968, HARRIET F. B. STUART, on behalf of the family trustees contacted IIT and expressed the decision of the family trustees that IIT receive a substantial portion of the trust estate.

11. The decision made by the family trustees was based upon the following facts:

(a) As president and sole stockholder of the investment banking firm of Halsey, Stuart & Co., Harold L. Stuart had a lifelong commitment to the investment and finance business. He especially wished to see more young men obtain a sound educational foundation in the investment and finance business and make that profession their career.

(b) For a period of approximately six months prior to the death of Harold L. Stuart, he frequently ex-

pressed his desire to the family trustees, his sisters with whom he lived, that a large portion of his estate, to be distributed pursuant to the Will, go to IIT for the construction and endowment of a school of management and finance and for other purposes.

(c) Harold L. Stuart attended Lewis Academy of Chicago between September 1896 and January 1900. Lewis Academy was a pre-college academy associated with Lewis Institute. IIT was formed in 1940 by a merger of Lewis Institute and the Armour Institute of Technology. Accordingly, the only educational institution in the Chicago area (where the decedent lived from 1891 until his death) with which the decedent was associated both during student days and thereafter was IIT. IIT is a major private university in the Chicago area offering undergraduate and graduate degrees in management, finance and related fields. Accordingly, the most appropriate institution for establishment of a school to carry on and foster the goals and interests of the decedent was and is IIT.

12. On or about August 2, 1968, at the request of the family trustees, IIT submitted to the trustees a formal proposal for a grant from the Trust to be used to establish the Harold Leonard Stuart School of Management and Finance (the "Stuart School") at IIT.

13. Believing that IIT should receive three-fourths ($\frac{3}{4}$ ths) of the distributable estate to carry out the aforesaid proposal for the Harold Leonard Stuart School of Management and Finance and believing that such $\frac{3}{4}$ ths proportion would be not less than \$8,500,000 in amount; the family trustees, on October 15, 1968 caused to be delivered to the corporate trustee an instrument in writing dated October 10, 1968, signed by them, selecting IIT as a qualified charitable organization under the Will and designating IIT to receive distribution from the Trust of \$8,500,000. A copy of said instrument is attached hereto, designated Exhibit F and incorporated herein by reference.

14. The family trustees' selection of IIT to receive a grant of \$8,500,000 was initially only in part approved and concurred in by the corporate trustee, namely, to the extent of \$5,000,000. On or about April 3, 1969 the trustees made a commitment to IIT of a grant of \$5,000,000, conditioned upon a matching grant of \$1,000,000 by IIT from its own funds, the aggregate to be used to establish the Stuart School. The grant of \$5,000,000 by the trustees has since been paid by the Trust to IIT and the matching grant of \$1,000,000 has since been provided by IIT from its own funds. A building has been constructed for the Harold Leonard Stuart School of Management and Finance, pursuant to the original proposal, and the school has commenced operation of undergraduate and graduate programs. Despite the corporate trustee's initial failure to concur and join in the full \$8,500,000 grant to IIT, the family trustees continued after April 3, 1969 to insist upon full payment of their designated grant to IIT and continued to request the corporate trustee to commit at least \$3,500,000 to IIT.

15. By letter dated October 7, 1970, addressed and delivered to the family trustees by the corporate trustee, a copy of which is attached hereto, designated Exhibit C, and incorporated herein by reference, the corporate trustee proposed, *inter alia*, a further commitment of \$3,500,000 to IIT, being the amount of the unpaid balance of the original grant of \$8,500,000 to IIT designated by the family trustees, after taking into account the \$5,000,000 grant payment theretofore made. Notwithstanding such additional designation of \$3,500,000 for IIT by the corporate trustee complementing and concurring in the family trustees' original proposal, the corporate trustee wrongfully and in violation of its trust duties subsequently refused to accede to and to distribute any part of such additional grant of \$3,500,000 to

IIT and proposed a new program of distributions which eliminated any further provision for IIT. The corporate trustee has sought to justify its said refusal by erroneously contending that its specific designation of IIT on October 7, 1971 was conditional only and dependent upon acquiescence of the family trustees in numerous grants out of the trust estate desired to be made by the corporate trustee.

16. Under the provisions of the Will the distributive powers of the trustees were to select within five (5) years following his death qualified charitable organizations as therein defined and to designate the amounts to be distributed thereto, but no authority was granted to any trustee to exercise its distributive power in a bargaining or trading manner, nor conditionally upon submission of any other trustee to its desires. The true purport and effect in law and equity of the corporate trustee's specific selection and designation of IIT to receive an additional grant of \$3,500,000 was an immediate written selection, within the meaning of the provisions of the Will, of IIT as a qualified charitable organization and its effective and unconditional designation to receive the additional grant of \$3,500,000. Said written selection and designation by the corporate trustee occurred while the written selection and designation of IIT by the family trustees remained in full force and effect and while it was pending as to the unpaid balance of \$3,500,000 of the initial proposed grant of \$8,500,000. Accordingly, the corporate trustee's written proposal of October 7, 1970 resulted in a concurrent and conjoint specification and designation by all trustees providing that IIT should receive the further sum of \$3,500,000.

17. The aforesaid conjoint written selections and designations of IIT by all trustees to receive the further sum of \$3,500,000 from the trust estate occurred within five (5) years following the death of Harold L. Stuart and accord-

ingly under the provisions of Article FIFTH (e) of the Will, the additional grant of \$3,500,000 to IIT became vested and indefeasible and in equity was funded. As soon as practical after June 30, 1971, the fifth anniversary of decedent's death, it was and became the duty of the trustees to pay said additional sum of \$3,500,000 to IIT together with any increase, gains, earnings or profits, which have been received or accrued with respect to that fund after June 30, 1971.

18. At all times IIT has been a qualified charitable organization within the meaning of the provisions of Articles FIFTH and SIXTH of the Will, and the trust assets currently available for charitable donation under the Will have at all times material hereto far exceeded the sum of \$3,500,000. While the family trustees desire the payment thereof to IIT, the corporate trustee wrongfully persists in its refusal to make payment thereof.

19. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff IIT prays, in the alternative, that the Court find and decree as follows:

1. That an additional grant of \$3,500,000 be distributed out of the corpus of the trust to IIT, together with any increase, gains, income or profits which have accrued to or been derived from the fund of \$3,500,000 after June 30, 1971, in discharge of the vested grant to IIT made by the trustees as set forth in the foregoing paragraphs of this Count III.

2. That IIT have such further or other relief as equity may require.

On
Supreme Court, U.S.
FILED

JUL 20 1979

MICHAEL RODAK, JR., CLERK

No. 78-1928

In the
Supreme Court of the United States
OCTOBER TERM, 1978

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Petitioners,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

CHICAGO HISTORICAL SOCIETY, et al.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

WILLARD L. KING

*Attorney for Chicago Historical Society
Respondent*

KING, ROBIN, GALE & PILLINGER
135 S. La Salle Street
Chicago, Illinois 60603

AUTHORITIES CITED

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Stuart v. Continental Illinois National Bank & Trust Co.,
68 Ill. 2d 502, 369 N.E. 2d 1262 (1977) "Stuart I".

Stuart v. Continental Illinois National Bank & Trust Co.,
75 Ill. 2d 22, 387 N.E. 2d 312 (1979) "Stuart II".

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1928

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Petitioners,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

CHICAGO HISTORICAL SOCIETY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI

This case is important only to its litigants. It has no National impact. No important principle of law is involved in it—it turns on its facts (See full statement of facts in 43 Ill. App. 3d 169; 356 N.E. 2d 1049). No last will comparable to Harold Stuart's can probably ever again come before the courts for construction.

Petitioners ignore the fact that the two opinions ("Stuart I and Stuart II") were written by the same judge. He can scarcely be accused of violating in his second opinion constitutional rights alleged to have been created only by his first.

Stuart I had stated that the Circuit Court erred in failing to find for IIT "as to" Count III. Count III asked for an additional grant to IIT of \$3.5 million "together with any increase, gains, income or profits thereof."

But Stuart I was not ambiguous about these "gains, income or profits." It stated: "We hold therefore, that upon remand an order be entered that an additional \$3.5 million of the estate be distributed to IIT." (68 Ill. 2d 502, 536). This clearly militated against IIT's claim for "gains, income and profits." And this construction was indicated also by the fact that any such gains, income or profits were part of the "excess funds" which were distributed rateably among the charities other than IIT. The opinion in Stuart I stated: "IIT is the only other charity which is precluded from taking a *pro rata* share in the excess funds, and the court could well have concluded that IIT's share of the estate was already of sufficient size." (68 Ill. 2d 502, 538). Stuart II held that Stuart I did not give IIT the "gains, income or profits." (75 Ill. 2d 22).

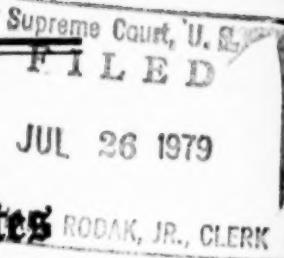
Petitioners rely upon the dissent by two judges of the Supreme Court of Illinois. That dissent reaches a different construction of the Harold Stuart will than the majority of the Court. But the dissent does not mention the due process clause of the 14th amendment or any other constitutional point. "Vested" has a somewhat different meaning in property law than in Constitutional law. (See Austin, Jurisprudence, 5th ed. 856; *Campbell v. Holt*, 115 U.S. 620, 628)

We submit that this Petition for Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1928

ELIZABETH B. STUART, not individually but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Petitioners,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

DE PAUL UNIVERSITY, et al.,

Respondents

**BRIEF OF RESPONDENTS DE PAUL UNIVERSITY
ET AL. IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE SUPREME
COURT OF ILLINOIS.**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1928.

ELIZABETH B. STUART, not individually but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and ILLINOIS INSTITUTE OF TECHNOLOGY, a not-for-profit corporation,

Petitioners,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

DE PAUL UNIVERSITY, et al.,

Respondents.

BRIEF OF RESPONDENTS DE PAUL UNIVERSITY
ET AL. IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE SUPREME
COURT OF ILLINOIS.

This brief is filed by the following twenty Respondents:

| | |
|-----------------------------------|--|
| DePaul University | Michael Reese Hospital and Medical Center |
| University of Chicago | Rush-Presbyterian-St. Luke's Medical Center |
| Northwestern University | Lyric Opera of Chicago |
| Loyola University of Chicago | YMCA of Metropolitan Chicago |
| Blackburn College | The Salvation Army—Greater Chicago Unified Command |
| The Art Institute of Chicago | American National Red Cross |
| Field Museum of Natural History | Boy Scouts of America |
| The Orchestral Association | Rehabilitation Institute |
| Children's Memorial Hospital | Girl Scouts of Chicago |
| Chicago Boys Clubs | |
| Mercy Hospital and Medical Center | |

The foregoing Respondents constitute all but one of the defendant Charitable organizations which are affected by the matters raised in the Petition for Writ of Certiorari filed by Elizabeth B. Stuart and the Illinois Institute of Technology.

In this Brief, the following abbreviations will be used:

Stuart II—Opinion of the Supreme Court of Illinois as reported in 75 Ill. 2d 22, 387 N. E. 2d 312 (1979)

Stuart I—Opinion of the Supreme Court of Illinois as reported in 68 Ill. 2d 502, 369 N. E. 2d 1262 (1977)

IIT —Petitioner Illinois Institute of Technology

Petition —Petition for Writ of Certiorari as filed by Elizabeth B. Stuart and IIT

OPINIONS BELOW.

Appendix A to the Petition purports to reproduce the pertinent parts of the opinion in Stuart I, but the reproduction is deficient because important portions of the opinion have been left out. The Stuart I opinion is reproduced as Appendix A hereto in its complete form.

JURISDICTION.

Respondents *deny* that the Petition is timely with respect to the matters sought to be reviewed, and therefore Respondents submit that jurisdiction is lacking to consider the Petition.

As stated more fully in the Counter Statement of the Case and Part I of the Argument herein, review is ostensibly being sought with respect to Stuart II; however, Stuart II was simply a reaffirmation of the judgment rendered in Stuart I. Therefore, it is the Illinois Supreme Court's judgment in Stuart I which petitioners are actually attempting to bring before this Court for review on certiorari. Stuart I, however, was decided on October 5, 1977 and became final on November 23, 1977 (when a petition for rehearing, not filed by petitioners, was denied). The 90 days allowed by 28 U.S.C. § 2101(c) for filing a petition for a writ of certiorari in respect of Stuart I expired long before the filing of the Petition. Since the Petition is not timely under 28 U.S.C. § 2101(c), jurisdiction is lacking and the Petition should be summarily denied for that reason.

STATUTES INVOLVED.

Respondents challenge the timeliness of the Petition under United States Code, Title 28, § 2101(c). This statute provides:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

QUESTIONS PRESENTED.

1. Whether a petition for certiorari is timely when it is filed more than sixteen months after the date on which a state

court judgment, which disposed of all issues in the litigation, became final but within ninety days after the entry of a second opinion by the same state court which only reaffirmed the first judgment.

2. Whether the standards set forth by the Supreme Court of the United States for determining when certiorari is appropriate are satisfied by a case which involved the construction of the will of an Illinois decedent, the effect of certain actions of the executors and trustees thereunder, the responsibility of an Illinois chancery court in administering an Illinois charitable trust, the meaning of various Illinois property law concepts, and a set of facts which is highly unlikely ever to be repeated.

COUNTER STATEMENT OF THE CASE.

The Statement of the Case as set forth at pages 3-11 of the Petition omits many facts necessary to a proper disposition of the Petition. In particular, Petitioners' Statement of the Case does not show the procedural history of Count III.

Genesis of Count III.

The Stuart litigation involved the construction and administration of the will of Harold L. Stuart, who died on June 30, 1966, a resident of Illinois. Stuart left the bulk of his sizable estate (around \$24 million) to charity without naming any specific charities in his will. Rather, his three executors were empowered to select charitable beneficiaries over a 5-year period commencing with the date of the decedent's death.

The decedent named his two sisters and the Continental Illinois National Bank and Trust Company of Chicago (the "Bank") as his executors. These executors agreed on several charitable grants, including a grant of \$5,000,000 to IIT in 1969. However, by the summer of 1970 they became dead-

locked as to further charitable selections.¹ The deadlock arose out of the sisters' insistence that IIT should be given the major share of the Stuart Estate. It was the Bank's view that a plan involving a number of charities was more consistent with the decedent's intention.

On October 7, 1970, the Bank tried to break the deadlock by proposing an overall plan of distribution which included the payment of an additional \$3.5 million to IIT. This proposal drew no response from the sisters and no response from IIT. Instead, on the same date, the sisters and IIT sued the Bank. Their complaint alleged that the sisters had the power to select charities whether or not the Bank was in agreement with the selections, and that the sisters had determined to give $\frac{3}{4}$ ths of the Stuart Estate to IIT. Despite the filing of this lawsuit, the Bank kept its proposal open for some 7½ months. On June 15, 1971, the Bank withdrew the proposal.

It was not until December 1972 that IIT asserted any claim to the \$3.5 million. At that time, the sisters and IIT filed their Second Amended Complaint in which IIT alone included a Count III asserting a vested right to the \$3.5 million and any increase, gains, income or profits thereon. (See Appendix D to the Petition.) The Stuart sisters did not join in Count III.

The Disposition of Count III in the Stuart I Litigation.

The most significant part of the Stuart I litigation concerned the issues raised under Count II of the Second Amended Complaint, in which the Stuart sisters and IIT advanced a number of theories in support of their efforts to obtain $\frac{3}{4}$ ths of the

1. The deadlock occurred because of the provision in the Stuart will regarding action by a majority of the executors. The will gave the majority the power to act, but the will also provided that ". . . the corporate Trustee or Executor shall be one of such majority." Thus, when the sisters aligned themselves against the Bank, a deadlock resulted.

Estate for IIT. Their distribution scheme was rejected by the trial court in favor of a broadly-based plan of distribution proposed by the Bank. The trial court's judgment relative to Count II was affirmed by the Appellate Court of Illinois and by the Illinois Supreme Court.

The trial court also decided Count III adversely to IIT and that judgment was affirmed by the Appellate Court. However, the Illinois Supreme Court held that \$3.5 million should be paid to IIT. No further amount was to be paid to IIT. This was clear from the holding itself in respect of Count III and from the judgment affirming the lower courts' holdings relative to Count II. Thus, the Supreme Court said in effect: pay \$3.5 million to IIT and pay the balance of the Stuart Estate to the charities as selected under the trial court's plan of distribution.

In its briefs and oral argument in the Illinois Supreme Court, IIT asserted a right to \$3.5 million *but IIT never mentioned any right to earnings*. The impression thus created was that IIT was seeking a flat \$3.5 million under Count III. (Indeed, in the conclusion section to its initial brief in Stuart I, IIT did not even ask for the \$3.5 million).

It was against this background that the Illinois Supreme Court discussed the Bank's proposal of an additional \$3.5 million grant to IIT, and then concluded the discussion with the holding: "We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT."

Post-Judgment Proceedings.

Following the filing of the opinion in Stuart I on October 5, 1977, a petition for a rehearing was filed by another party on a point unrelated to Count III. That petition was denied on November 23, 1977 and on December 2, 1977, the case was remanded to the Circuit Court of Cook County. Two weeks later, on December 16, 1977, disregarding their silence in the

Illinois Supreme Court on the subject of earnings, IIT and Elizabeth Stuart (the other Stuart sister having died some months earlier) filed a "petition for accounting" in the Circuit Court in which they demanded that the court hold an accounting proceeding to determine earnings on the \$3.5 million and that such earnings be paid to IIT.

The Respondents herein and certain other charities filed a motion to dismiss the accounting petition in early January 1978. On January 20, 1978, Ms. Stuart and IIT filed a reply in which they, *for the first time in all of the Stuart litigation*, alleged that a federal question, in the form of a 14th Amendment due process right, was involved.

In recognition of the holding of the Illinois Supreme Court as to Count III, the trial court declined to order any accounting proceedings and the court dismissed the petition on April 20, 1978.² The dismissal of the accounting petition was appealed by Elizabeth Stuart and IIT on May 17, 1978. Stuart II eventually followed. In Stuart II, the Supreme Court reaffirmed its judgment in Stuart I that IIT was to receive \$3.5 million and no more.

ARGUMENT.

Nothing in the present case warrants review by the highest Court of the land. No federal question is presented, no issue of national importance is involved, and no failure to accord due process has occurred; therefore, the petition for certiorari should be denied. Even before reaching these reasons, however, the Petition should be denied because it was not timely filed. Since the lack of timeliness of the Petition goes to the Court's jurisdiction, we will consider this point first.

2. In an earlier order entered on December 16, 1977 and not appealed by anyone, the trial court ordered payment of \$3.5 million to IIT and payment of the balance of the estate (less two reserve funds) to the charities entitled thereto under the Count II judgment. One of such reserve funds was set at \$2.2 million and is still being held to cover the Stuart/IIT claim for earnings.

THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITION BECAUSE OF ITS UNTIMELY FILING.

A. In Effect, the Petitioners Are Attempting to Obtain Review of the Stuart I Judgment.

In Stuart I, the Supreme Court of Illinois rendered two judgments relevant to the present proceedings: in connection with Count III, the Court held that \$3.5 million was to be paid to IIT; and in connection with Count II, the Court affirmed the plan of the trial court, which meant that the balance of the Estate was to be paid to the charities selected under the plan.

If petitioners were dissatisfied with this resolution of the case, their obvious route to a review of Stuart I was a petition for rehearing. Had such a petition been filed, a prompt and orderly disposition of the earnings claim could have been accomplished. Instead of seeking review in this normal manner, however, petitioners withheld all of their comments on Stuart I until the case had been returned to the trial court for the entry of the mandated orders. Only then did petitioners bring out their interpretation of Stuart I in the form of a petition for an accounting proceeding to determine earnings. This oblique approach to a review of Stuart I produced only a reaffirmance of the Stuart I judgment in Stuart II. Now, petitioners are trying to obtain a review of Stuart I in this Court.

The circuitous route followed by petitioners in their efforts to obtain a modification of the Stuart I judgments is not the path to the invocation of jurisdiction in this Court. This Court has made it abundantly clear that a second opinion or decree in a case does not automatically establish a new time frame within which certiorari can be sought as to matters covered in the first opinion. As stated in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952), "The question is whether the lower court, in its second

order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

The answer to this question in the present case is plainly in the negative. Petitioners' maneuverings in the trial court on remand and their appeal in Stuart II produced no change whatsoever in the Stuart I judgments. Stuart I thus stands as the final adjudication of all issues in the litigation. Review in this Court on certiorari was therefore obtainable, if at all, by a petition filed not later than 90 days from the date on which Stuart I became final. See *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20 (1952):

If the court did no more by the second judgment than to restate what it had decided by the first one, *Department of Banking v. Pink*, 317 U.S. 264, would apply and the 90 days would start to run from the first judgment.

See also *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952): "[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought."

Stuart I was decided on October 5, 1977 and a petition for rehearing (not filed by petitioners) was denied on November 23, 1977. At that point Stuart I became a final decision. Petitioners have conceded the finality of Stuart I; see the Petition, page 16, footnote 6: "It is beyond question that the October 5, 1977 decision of the Supreme Court of Illinois in Stuart I was a final decision." At the very latest, Petitioners had ninety days from November 23, 1977, to file a petition for certiorari in this Court. 28 U.S.C. § 2101(c). Under the authorities cited above, that ninety-day period was not tolled by the subsequent proceeding in the circuit court and by the appeal in Stuart II. Since the Petition has been filed more than sixteen months after the relevant deadline the Petition is not timely.

B. Stuart II Does Not Consist of Any "Adjudication" Which Is Inconsistent with Any "Adjudication" in Stuart I.

In an attempt to overcome the jurisdictional defect in their position, petitioners have struggled to characterize Stuart II as an "adjudication" of the Count III issues which is at variance with an "adjudication" of the same issues in Stuart I. There is no such variance. Stuart I and Stuart II are absolutely consistent. In Stuart I, the Illinois Supreme Court held that IIT was to receive \$3.5 million and no more. In Stuart II, the court reaffirmed this holding.

The argument made in the petition overlooks the settled principle in Illinois that it is the holding of a case—not the opinion—which determines the rights of the parties. Thus, in *Adams v. Pearson*, 411 Ill. 431, 437, 104 N. E. 2d 267, 270 (1952), the Illinois Supreme Court said: "It is well settled, however, that what has been adjudicated is to be determined not from the opinion rendered but from a consideration of the judgment actually entered in reference to the issues presented for decision." And in *People ex rel William J. Scott v. Chicago Park District*, 66 Ill. 2d 65, 70, 360 N. E. 2d 773, 776 (1976), the Illinois Supreme Court said: "However, all of the language in an opinion does not necessarily express the actual holding by the court."

This Court has repeatedly expressed the same principle. See *Black v. Cutter Laboratories*, 351 U. S. 292, 297 (1956) and *Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 734 (1978): "This Court, however, reviews judgments, not statements in opinions."

C. Summary.

For the foregoing reasons, Respondents submit that the Petition is not timely in respect of the matters which it presents to this Court and that the Petition should be denied for lack of jurisdiction.

II.

THIS LITIGATION INVOLVES ONLY MATTERS OF LOCAL LAW AND, THEREFORE, DOES NOT MEET THE STANDARDS GOVERNING REVIEW ON CERTIORARI.

Even if petitioners had filed a timely petition for certiorari with respect to Stuart I, the Petition does not present facts which satisfy the standards for granting review on certiorari.

This litigation involved the construction of the will of an Illinois decedent and the effect of certain actions of the executors and trustees thereunder, the responsibility of an Illinois chancery court in administering an Illinois charitable trust when the trustees are deadlocked, and the meaning of various Illinois property law concepts. All of these matters are purely local in nature. While this case is of importance to the litigants, it is not important to anyone else and the facts are so unusual that it is highly unlikely that any similar case will arise in the future. Thus, there are no "special and important reasons" for granting certiorari herein. See Rule 19, paragraph 1 of the Rules of the Supreme Court. This Court has said that it does not act for the benefit of particular litigants and that the term "special and important reasons" implies a reach to a problem beyond the academic and episodic. See e. g., *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 74 (1955). A practical example of the application of these standards is found in *Black v. Cutter Laboratories*, 351 U. S. 292 (1956), where a writ of certiorari was dismissed when the court concluded that ". . . the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented."

The present case involves only Illinois' construction of the will of a local decedent under local law. No federal question is presented and there is no reason why certiorari should be granted.

III.

**THE PETITIONERS' TACTICS IN THE COURTS BELOW
SHOULD BAR THEM FROM ANY FURTHER REVIEW IN
THIS COURT.**

In addition to the objections to a grant of certiorari as set forth under Points I and II herein, the positions and tactics adopted by petitioners in the courts below make any review of the Stuart case by this Court completely unwarranted.

The Petition is necessarily founded on the proceedings which culminated in *Stuart I*. The principal issue in those proceedings was always petitioners' claim that three-quarters of the Stuart Estate should go to IIT. That claim was tried and appealed in the context of Count II of the Second Amended Complaint. Count III was obviously a back-stop alternative to Count II. Indeed, as previously noted, the Stuart sisters did not even join in Count III.

In the Illinois Supreme Court in *Stuart I*, IIT said not one word in either its initial brief or its reply brief about earnings and earnings were never mentioned in the course of IIT's oral argument.³ The Illinois Supreme Court was thus not even made aware of any claim by IIT for earnings and the Court's holding as to Count III, which awarded to IIT the specific sum of \$3.5 million, was fully responsive to IIT's argument as presented to the Court.

Petitioners have belatedly sought to make IIT's earnings claim a part of IIT's presentation in the Illinois Supreme Court by arguing that the claim was included in Count III of the Second Amended Complaint. (Petition, p. 13) The Second Amended Complaint was included as part of a 940-page abstract of record. It is unthinkable that a reviewing court should be deemed to have examined and decided material presented only through

3. Since the Stuart sisters were not parties to Count III, their presentation in the Illinois Supreme Court did not touch upon Count III at all.

the abstract of record and not raised in briefs or in oral argument. The well-understood rule in Illinois is that it is not the duty of a reviewing court to search the record to determine the issues, or to seek material for the disposition of such issues. *Biggs v. Spader*, 411 Ill. 42, 44, 103 N. E. 2d 104, 106 (1951), cert. den. 343 U. S. 956; *47th & State Currency Exchange Inc. v. B. Coleman Corporation*, 56 Ill. App. 3d 229, 232, 371 N. E. 2d 294, 297 (1977).

If IIT had problems reconciling the Illinois Supreme Court's holding with respect to Count III with that Count as set forth in the Second Amended Complaint, IIT had an appropriate form of recourse: a petition for rehearing filed within the requisite time period following the entry of the *Stuart I* opinion. However, IIT did not file any such petition for rehearing. Instead, IIT waited until the case was back in the trial court on remand; at that point, IIT, together with Elizabeth Stuart, asked the trial court to conduct new proceedings and to enter orders which clearly went beyond the scope of the directions given to the trial court by the Illinois Supreme Court. The trial court denied these requests, and properly so in the light of the Illinois Supreme Court's specific holdings and directions.

In view of the foregoing record, it is difficult to see how in *Stuart II* the Illinois Supreme court could come to any conclusion other than that *Stuart I* should be reaffirmed.⁴

Moreover, the foregoing record should be seen in the overall context of the Stuart Estate following *Stuart I*. Although not named in the Stuart will, IIT had emerged with \$8.5 million in distributions from the estate, a figure more than six times the amount received by any other charity. IIT had also received

4. The record makes the res judicata argument which is set forth at length in the Petition very difficult to comprehend. If the res judicata doctrine has any relevance in this case, it cuts against the petitioners. In *Stuart I*, the earnings claim was decided against IIT. Under the doctrine of res judicata, IIT should not be permitted to relitigate the claim. Having managed to get back to the Illinois Supreme Court despite the doctrine, it hardly follows that the doctrine required the court to come up with a different result.

some \$350,000 from a life trust established for Harriet Stuart, then deceased. IIT had (and still has) a remainder interest in a life trust for Elizabeth Stuart. Obviously, IIT had fared extremely well in the administration of the estate.

Of the \$8.5 million received by IIT from the Stuart Estate, \$3.5 million has been paid to IIT under the very holding which petitioners are now criticizing in the Petition. Meanwhile, over \$2.2 million, which should have been distributed in late 1977 to the Respondents and the Chicago Historical Society in accordance with Stuart I, has languished in a reserve while petitioners have pressed their newest theories in the trial court on remand from Stuart I, then in a second appeal to the Illinois Supreme Court, and now in this Court.

The Petition, which is only an attempt to enlarge IIT's participation in the Stuart Estate to an even greater degree, furnishes no basis for review by this Court, whether on some theory of constitutional law or on any other theory. IIT has had more than ample opportunities to present its earnings claim. Whenever the claim has been presented, it has been rejected. Petitioners have been accorded full due process by the courts of Illinois and they now stand as unsuccessful litigants and nothing more. There is simply no reason why the time of this Court should be taken up with the Count III earnings issue in the estate of an Illinois resident who died more than thirteen years ago.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX A.

IN THE SUPREME COURT OF ILLINOIS

ELIZABETH B. STUART, not individu-
ally, but as a co-trustee under the
Last Will and Testament of Harold
L. Stuart, deceased, and ILLINOIS
INSTITUTE OF TECHNOLOGY, a not-
for-profit corporation,

Plaintiffs-Appellants,
vs.

CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY OF
CHICAGO, a national banking asso-
ciation, not individually, but as a
co-trustee under the Last Will and
Testament of Harold L. Stuart, de-
ceased.

Defendant-Appellee,

CHICAGO HISTORICAL SOCIETY, ET AL.,
Intervenors, Defendants-Appellees.

Appeal from the Ap-
pellate Court for the
First District; heard
in that court on ap-
peal from the Cir-
cuit Court of Cook
County,

The Honorable
Francis T. Delaney,
Judge, presiding.

OPINION FILED OCTOBER 5, 1977—REHEARING
DENIED NOVEMBER 23, 1977

(Nos. 49070, 49074 cons.-Affirmed in part
and reversed in part and remanded.)

ELIZABETH B. STUART ET. AL., *Appellants*, vs. CONTINENTAL
ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO
ET. AL., *Appellees.*

Opinion filed Oct. 5, 1977.—Rehearing denied Nov. 23, 1977.
MR. JUSTICE RYAN delivered the opinion of the court:

This appeal involves a dispute between a corporate co-trustee
and two individual co-trustees concerning the disposition of a

large charitable trust fund created by the will of Harold L. Stuart. The individual co-trustees, the sisters of the late Harold L. Stuart (hereinafter referred to as the Stuart sisters), brought the original complaint together with a co-plaintiff, the Illinois Institute of Technolgy (hereinafter referred to as IIT), against the corporate co-trustee, the Continental Illinois National Bank and Trust Company (hereinafter referred to as the Continental Bank). The dispute arose because the individual co-trustees and the corporate trustee were unable to agree upon a plan of distribution. Additionally, 27 charitable organizations, which were named in the plans of distribution submitted by the co-trustees, were granted leave to intervene in the lower court. The circuit court of Cook County essentially adopted the plan of distribution submitted by the corporate co-trustee in preference to the scheme of distribution advanced by the individual co-trustees. The circuit court's judgment was affirmed in all respects by the appellate court. (*Northern Trust Co. v. Continental Illinois National Bank & Trust Co.* (1976), 43 Ill. App. 3d 169.) We granted leave to appeal pursuant to our Rule 315(a) (58 Ill. 2d R. 315(a)) and now affirm the decision of the appellate court in part, and reverse that decision in part.

The facts involved in the present appeal are lengthy and complex. A full statement of the facts is included in the opinion of the appellate court, and we shall set out only those facts necessary for an understanding of our disposition of this case.

Harold L. Stuart died on June 30, 1966. He was unmarried and was survived by his two unmarried sisters. He was a renowned financier and investment banker and was the president and sole stockholder of the investment banking firm of Halsey, Stuart and Co., Inc. All parties agree that Harold Stuart was devoted to the city of Chicago, and that his lifelong desire was to build the city into a financial center. The testator left a multi-million dollar estate which presently is valued in excess of \$26 million.

Harold Stuart's will was executed on April 23, 1964. It named the Continental Bank and his two sisters as co-executors and co-trustees. The will provided for the creation of two \$1 million trust funds to provide life estates for each sister with the remainders to charity. The remainder of his estate was to be distributed to qualified charitable organizations. The will did not mention specific charities, but rather vested the discretion to select charitable beneficiaries in the co-trustees. Under the will, the trustees were to select these charities within 5 years of the testator's death.

The testator's will was solicited for the Continental Bank by David M. Kennedy, who was then the chairman of the board of the bank. Kennedy recommended a senior partner of the law firm which represented the bank to draft the will, and the testator had this attorney prepare the will. Kennedy testified that he spoke with the attorney while the will was being drafted and asked that co-executors and co-trustees be named in addition to the Continental Bank. The testator was 82 years of age at the time the will was drafted, and shared a home with his two sisters in Chicago.

The trial court heard conflicting testimony concerning the testator's intentions from the time the will was executed until his death. This testimony is more fully recounted in the appellate court's opinion than shall be set forth here. In essence, however, the testimony of several bank officers was that the testator had no specific plan of distribution in mind and that he had expressed the desire that the bank be primarily responsible for the selection of the particular charities to take from his estate. The testimony of co-trustee Elizabeth Stuart was to the contrary. She testified that the testator frequently discussed his will with her and her sister, and told them that in the event of a disagreement between the two sisters the bank would cast the deciding vote. Elizabeth Stuart further testified that the testator had orally apprised her and her sister of the charities to which gifts should be made. She stated that the testator had determined that

three-quarters of his estate should be donated to IIT to construct and endow a school of finance and management. The other individual co-trustee, Harriet Stuart, did not testify at the trial.

The Continental Bank and the Stuart sisters qualified as co-executors on August 29, 1966. The testimony of the bank officer responsible for the administration of the estate indicated that the bank was inundated with requests from charitable organizations once the provisions of the will became publicly known. Approximately seven months after the testator's death, Harriet Stuart contacted IIT to receive information concerning its programs. She later requested and received additional information that her brother had attended Lewis Institute for five semesters between 1896 and 1900. Lewis Institute merged with Armour Institute in 1940 to form IIT. In May of 1968, Harriet Stuart contacted IIT and informed officials there that she and her sister desired to make a substantial grant to the institution. She requested a proposal concerning the possibility of establishing a school of management and finance. IIT prepared such a proposal and submitted it to the sisters. The proposal originally requested \$7.5 million to fund the school, but this figure was subsequently raised to \$8.5 million.

On October 10, 1968, the Stuart sisters filed a "Statement of Intent" with the bank in which they formally directed that IIT receive \$8.5 million to establish the Harold Leonard Stuart School of Management and Finance. The officials at the Continental Bank considered the amount of this grant inappropriate. After meeting with representatives of IIT, the bank agreed to a reduced proposal in the amount of \$5 million on April 3, 1969, and this amount was subsequently disbursed to IIT. The Continental Bank and the sisters also were able to reach agreement concerning grants to the Society of Cincinnati and the Kenilworth Historical Society. The gifts to each organization were sponsored by the Stuart sisters and not the bank. Elizabeth Stuart testified that the testator had instructed her and her sister that these organizations should take under the will. A distribu-

tion of \$250,000 was also made to the Chicago Foundation for Cultural Development on January 26, 1968. This distribution was made with the prior understanding that the money would be transferred to the New Chicago Foundation. As the propriety of this distribution is a central issue in this appeal, we shall set forth the salient facts surrounding the transaction in our discussion of that issue.

In the circuit court, a great deal of testimony was heard concerning the conduct of the co-trustees during the time following the testator's death until the institution of the lawsuit on October 7, 1970. Essentially, the evidence showed that the Stuart sisters and the Continental Bank were never in complete agreement as to either the identities of the charitable beneficiaries or the manner in which they would be selected. The bank was from the outset interested in distributing the estate to a large number of charities and preferred to develop a total plan for distribution. The Stuart sisters, on the other hand, were interested only in considering those charities which they asserted to have been the choices of their brother. The sisters also preferred to consider bequests to only one charity at a time. The sisters also declined to attend personal meetings with bank representatives, and, generally, did not feel that the bank should have any significant voice in the selection process.

This was the approximate state of affairs on October 7, 1970, when the Stuart sisters and IIT filed suit. The complaint requested a judgment providing for an additional grant to IIT to the extent of three-fourths of the estate, and also sought entry of a judgment providing that all further disputes between co-trustees should be resolved by the decision of the individual co-trustees. On this same date, the Continental Bank proposed a revised plan of distribution in a letter to the Stuart sisters. Under the plan, grants were to be made to a number of charities and an additional \$3.5 million was designated for IIT.

It its answer to the complaint, the bank set forth its total plan of distribution and requested that the trust be distributed in that

manner. The answer also stated that the disagreement between the co-trustees was that the bank proposed a total gift of \$8.5 million to IIT, whereas the Stuart sisters wanted that institution to receive three-quarters of the estate.

On June 15, 1971, the bank, by letter to the Stuart sisters, made its final proposal. This proposal adhered to the selections of charitable beneficiaries contained in the letter of October 7, 1970, with the exception that the bank no longer proposed an additional gift to IIT. The letter stated that agreement had been reached on four proposals: \$5 million to IIT; \$600,000 to the Kenilworth Historical Society; \$550,000 to the Society of Cincinnati; and \$250,000 to the Chicago Foundation for Cultural Development. The bank then proposed that the remaining funds be distributed in the following manner:

"1. Make specific dollar commitments to the following institutions:

| | |
|-------------------------------------|-------------|
| a. The University of Chicago | \$1,000,000 |
| b. Northwestern University | 1,000,000 |
| c. Loyola University of Chicago | 1,000,000 |
| d. DePaul University | 1,000,000 |
| e. Chicago Historical Society | 500,000 |
| f. Blackburn College | 300,000 |
| g. The Art Institute of Chicago | 1,000,000 |
| h. Chicago Symphony Orchestra | 1,000,000 |
| i. Field Museum of Natural History | 1,000,000 |
| j. Mercy Hospital | 250,000 |
| k. Michael Reese Hospital | 250,000 |
| l. Presbyterian-St. Luke's Hospital | 250,000 |
| m. Children's Memorial Hospital | 250,000 |

2. Make fractional share commitments to the following institutions each to receive the dollar amount indicated or 1/9th of the remainder of the Trust (i.e., excluding specific dollar amount gifts), whichever is smaller, when such remainder is finally determined:

| | |
|---|-----------|
| a. Lyric Opera | \$200,000 |
| b. Union League Foundation for Boys Clubs | 150,000 |
| c. Chicago Boys Club | 100,000 |
| d. Central YMCA Community College and High School | 100,000 |
| e. The Salvation Army-Chicago Chapter | 100,000 |
| f. The American Red Cross-Chicago Chapter | 100,000 |
| g. The Boy Scouts of America-Chicago Chapter | 50,000 |
| h. The Girl Scouts of America-Chicago Chapter | 50,000 |
| i. The Rehabilitation Institute of Chicago | 25,000 |

3. Any amount remaining after these gifts will be allocated in equal shares among the following:

Museum of Science and Industry
Chicago Educational TV
Lake Forest College
Berea College
Union College
Rockford College

provided, however, that if the amount remaining to be allocated to this group number 3 shall exceed \$300,000, each of this group shall receive \$50,000 and the residual amount shall be allocated among the institutions listed in groups numbers 1 and 2 on a proportionate basis. (Each institution listed in groups numbers 1 and 2 shall receive that part of the amount in excess of \$300,000 as bears the same proportion to such excess amount as does the dollar amount specified for that institution under the terms of group number 1 or 2 bears to the total dollar amount specified for all the institutions under groups numbers 1 and 2.)"

The bank incorporated this plan into its amended answer of June 22, 1971.

The Stuart sisters responded to this proposal in a letter dated June 22, 1971. In the letter, the sisters specifically denied that they had approved a gift to the Chicago Foundation for Cultural Development, and stated that they did not even have knowledge of the gift until it was disclosed in the bank's pleadings. The sisters acknowledged their agreement to the other three completed gifts listed in the bank's letter and then set forth their plan for final distribution:

"Accordingly, our definitive plan for the distribution of the remainder of the Harold L. Stuart Estate is to make immediate specific dollar commitments as follows:

| | |
|----------------------------------|-------------|
| Illinois Institute of Technology | \$4,000,000 |
| Art Institute of Chicago | 5,000,000 |
| Kenilworth Historical Society | 30,000 |

The gift of \$5,000,000 to the Art Institute, however, is to be reduced (but not below \$2,500,000) to the extent necessary to give Illinois Institute of Technology at least 75% of the total amount of the estate passing to all charities, disregarding for this purpose what Illinois Institute may receive from the trusts created for us under our brother's will.

If any funds remain after making the foregoing distributions, they are to be given to Illinois Institute of Technology to provide additional endowment for the Harold Leonard Stuart School of Management and Finance.

We also hereby specify the distribution to be made of the remainder interests in the trusts created for us under our brother's will. If the funds remaining in the trust of the one first to die equal or exceed \$500,000, a grant of that amount shall be made to the Chicago Historical Society; if the funds remaining in the other trust at the death of the survivor equal or exceed \$500,000, a grant of that amount shall be made to the Newberry Library; and, subject to such conditional grants, the remainder interest in each of our trusts shall go to Illinois Institute of Technology to increase the endowment of the Stuart School."

On June 29, 1971, the Stuart sisters and IIT filed an amended complaint. A second amended complaint which contained four counts was later filed. Count I was brought by the sisters and alleged that the bank had breached the trust provisions of the will by reason of its payment of \$250,000 to the New Chicago Foundation. Count II was brought by both the sisters and IIT. Count II requested that the estate be distributed in accordance with the plan contained in the sisters' letter of June 22, 1971, and requested that all future disputes be resolved by the decision of the two family trustees. Count III was brought by IIT alone and sought a declaration that IIT had a vested interest in an additional grant of \$3.5 million. Count IV was also brought by IIT alone and sought a declaration that IIT had a vested interest in the remainders of the personal trusts to be enjoyed after the termination of the sisters' life estates.

On September 15, 1971, the plaintiffs filed a motion for judgment on the pleadings on the basis of an interpretation of Article Seventh of the will. This motion was denied. Subsequently, 27 charities which were named in the various proposals were granted leave to intervene.

The circuit court entered judgment on November 15, 1974, after a trial without a jury. The trial court held for the bank as to the first three counts of the complaint. The court found the gift to the Chicago Foundation for Cultural Development to be proper although the court also found that the gift had not been approved by the Stuart sisters. The circuit court also approved and adopted the entire distribution plan proposed by the bank. In regard to count III, the court found that IIT had no right to an additional grant of \$3.5 million. The circuit court did, however, find for IIT on count IV and directed that the remainder interests in the personal trusts of the sisters be distributed in accordance with the sisters' wishes upon termination of the life estates. The plaintiffs appealed the rulings as to the first three counts, and the appellate court affirmed the lower court's decision in all respects. Harriet Stuart died while this

cause was pending before the appellate court. The Northern Trust Company, as executor of her estate, appears before this court as cross-appellee to respond to the cross-appeal of De Paul University *et al.* challenging the sisters' right to fees and expenses as executors and trustees.

In rendering its judgment, the circuit court did not purport to be establishing its own scheme of distribution. Rather, the court made it clear that it was accepting the bank's plan in total with the exception of its ruling as to count IV. The appellate court also considered the issue facing the trial court to be which of two competing plans to adopt. (43 Ill. App. 3d 169, 197.) While this case was pending in the appellate court, the Stuart estate received approximately \$4.5 million as a result of certain Federal estate tax litigation. The trial court had been informed that the parties expected an additional \$3.5 million to be available as a result of this litigation. At present, the amount of distributable funds exceeds the \$9.75 million aggregate of the specific dollar commitments in the bank's plan, which was approved by the circuit court, by more than \$6.5 million. Under the lower court's rulings, this money will be distributed on a *pro rata* basis to the charities which comprise groups 1 and 2 of the bank's plan which we have previously quoted. Under the bank's plan, IIT and the group 3 charities are precluded from sharing in the additional \$6.5 million. Additionally, under the circuit court's ruling it appears that the Chicago Historical Society will receive \$1 million although the bank and the Stuart sisters designated that charity for no more than a \$500,000 grant.

A number of issues, and subissues, have been raised by the various parties to this appeal. The Stuart sisters and IIT contend that the payment of \$250,000 to the Chicago Foundation for Cultural Development constituted a breach of trust on the part of the bank and argue that severe sanctions should be applied to the bank. Plaintiffs, IIT and the Stuart sisters, and an intervenor, the Art Institute of Chicago, also advance several

contentions relating to the construction of Harold Stuart's will which, if accepted, would mandate reversal of the circuit court's judgment and adoption of the distribution plan proposed by the sisters. Alternatively, IIT and the Stuart sisters contend that the circuit court's adoption of the bank's scheme of distribution was erroneous. Plaintiff IIT contends, in the alternative, that it has a vested interest in an additional \$3.5 million of the estate. Plaintiffs also challenge the amount of the grant which will be received by the Chicago Historical Society under the circuit court's decision.

Finally, a number of the charitable intervenors cross-appeal from the circuit court's order approving a grant of fees to attorneys for the plaintiffs. And, the Museum of Science and Industry, an intervenor, cross-appeals from the circuit court's ruling which limits the museum to a grant of \$50,000.

The first issue to be considered is whether the bank breached its duty as a trustee by unilaterally distributing \$250,000 to the Chicago Foundation for Cultural Development. This grant was made to the above organization with the prior understanding that the money would be passed on to the New Chicago Foundation. The circuit court found that the Stuart sisters had not assented to this gift and that they would not have agreed to it, but nonetheless found the gift to be "proper."

The New Chicago Foundation published Chicago Magazine. The Chicago Foundation for Cultural Development and the New Chicago Foundation were suborganizations of the Mayor's Committee for Economic and Cultural Development of Chicago. Kennedy, the then chairman of the board and chief executive officer of the Continental Bank, had been active in the creation of the Mayor's Committee in 1961. He was on the executive board of the Mayor's Committee and was a founding director of the New Chicago Foundation. Another bank official served as president of the New Chicago Foundation and as an officer of the Foundation for Cultural Development. As mentioned, it is uncontested that the \$250,000 grant was made to

the Foundation for Cultural Development with the prior understanding that the money would be transferred to the New Chicago Foundation to be used for the publication of Chicago Magazine. The magazine was a project of the Mayor's Committee and was intended to create a favorable impression of Chicago by publishing articles about the city.

Harold Stuart's will provided that distributions were to be made to "qualified charitable organizations." In Article Fourth of the will that term was defined in part as "qualified exempt organizations for the purposes of Sections 170(c), 501(c)(3) and 2055 and other related provisions of the Internal Revenue Code in effect at the time of my death." The New Chicago Foundation was not qualified as an exempt organization under section 501(c)(3).

Kennedy testified that he had spoken to Harriet Stuart and proposed a gift to the New Chicago Foundation. He further testified that Harriet Stuart did not expressly concur in the proposal. Kennedy described Harriet Stuart's reaction to the proposal as follows: "And I had no reaction to that, good, bad or indifferent. I didn't have any yes, no, I don't know, on it. It was just a statement by me." Elizabeth Stuart testified that she was unaware of the distribution until three years after it was made, and the bank admitted that prior to October 7, 1970, no document was sent to the Stuart sisters which mentioned either the Mayor's Committee, the Foundation for Cultural Development or the New Chicago Foundation.

On January 16, 1968, Kennedy directed the bank's trust department to transfer \$250,000 from the Stuart trust to the account the New Chicago Foundation kept with the bank. He also requested that written authorizations be prepared for the Stuart sisters' signatures. The authorizations were prepared but were never sent to the family trustees. When it was learned that the New Chicago Foundation was not a qualified organization under section 501(c)(3), Kennedy directed that the disbursement be made through the Foundation for Cultural Develop-

ment which was so qualified, and the \$250,000 was transferred in this manner. The funds were used to support the now-defunct Chicago Magazine.

In September of 1969, it became necessary to establish a charitable trust. Prior to this time, the bank had hoped that distributions to charity could be made directly from the Stuart estate, but the pending Federal tax litigation made that plan impractical. In the second current account of the probate estate, the bank listed the \$250,000 disbursement of January 26, 1968, as a partial disbursement from the estate to the Harold L. Stuart charitable trust. No mention was made of the New Chicago Foundation or of the Foundation for Cultural Development in either the probate account or in the account receipt presented to, and signed by, the individual trustees.

The Stuart sisters contend that the bank violated its duty as a trustee by disbursing \$250,000 without obtaining the approval of the individual trustees, and by transferring that amount to an organization that was not qualified to take under the will. We agree that the bank's conduct in relation to the gift to the New Chicago Foundation constitutes a breach of trust.

The bank does not argue that it had authority under the Stuart will to make disbursements without the concurrence of at least one of the family trustees while both of the sisters were living. Though several interpretations of the will are advanced by the various parties, no party contends, nor could it reasonably be argued, that the bank had the unilateral authority to make disbursements at the time the gift was given to the New Chicago Foundation. The bank, however, now asserts that the circuit court had the authority to retroactively approve the bank's actions. The bank seemingly argues that since the court could have approved of this gift if a *bona fide* deadlock existed under the will, then it does not matter that there was no deadlock at the time the funds were distributed. We find this line of reasoning to be without merit.

It is axiomatic that the limits of a trustee's powers are determined by the instrument which creates the trust (Restatement (Second) of Trusts sec. 164 (1959); *McGookey v. Winter* (1943), 381 Ill. 516, 524), and that a co-trustee cannot exercise a joint power individually (Restatement (Second) of Trusts secs. 194, 383 (1959); 90 C. J. S. *Trusts* sec. 258 (1955); *Maton Bros., Inc. v. Central Illinois Public Service Co.* (1934), 356 Ill. 584; *Dingman v. Boyle* (1918), 285 Ill. 144, 148).

In *Chicago Title & Trust Co. v. Chief Wash Co.* (1938), 368 Ill. 146, 155, this court defined the term "breach of trust":

"The term 'breach of trust' is sufficiently comprehensive to include every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness. Included is every omission or commission which violates in any manner the three major obligations of carrying out a trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith."

Under this definition, the bank's exercise of unauthorized distributive power clearly constituted a breach of its duty to carry out the trust according to its terms.

The bank's conduct reveals that it was aware that it had no authority to unilaterally make the gift in question. Written authorization was prepared for the sisters' signatures, but was never sent to them. Also, Kennedy's testimony revealed that he knew he did not have the express approval of the Stuart sisters, and no explanation is offered for the failure of the bank to obtain such assent before releasing the \$250,000.

In addition, there is a second independent ground upon which to predicate a holding that the bank breached its duty as trustee. The will of Harold Stuart specifically required that grants be made only to charitable organizations which qualified for an exemption under section 501(c)(3) of the Internal

Revenue Code. The New Chicago Foundation was not so qualified, and the bank was well aware of this as evidenced by the circuitous manner in which it transferred the funds to that foundation. The authorization which had been prepared for the sisters' signatures specified the New Chicago Foundation as the donee and not the conduit through which the money ultimately passed.

The circuit court had no authority to approve the grant under the circumstances of this case. We are aware of no authority which would authorize a court of equity to condone an unauthorized distribution to an unqualified beneficiary absent exceptional and unusual circumstances. As precedent for its position the bank relies almost exclusively upon *Warner v. Rogers* (1929), 255 Ill. App. 78. In *Warner*, the testator left an estate composed of large holdings of farmland. The will created a trust whereby the beneficiaries of the life estate, testator's grandchildren, were also the trustees. In their capacity as beneficiaries, the trustees entered into an agreement naming one of their number as managing trustee. Under the agreement, the approval of the other trustees was necessary in order to make repairs and improvements except those of a small temporary and urgent nature. The managing trustee made numerous repairs which were not agreed to by one of the trustees. This trustee's consent could not be obtained because she was living abroad during the time in question. The court found that most of the repairs made were "small and urgent," and further found that the larger repairs were "urgent and necessary to the preservation of the [property]." (255 Ill. App. 78, 87.) The appellate court noted that the managing trustee should have sought leave of court to make the few large repairs and stated that the circuit court would have granted approval had he done so. The appellate court then held that "under the facts as they specifically appear in this particular case, we do not believe that in equity and good conscience appellee should be penalized for not having done so." 255 Ill. App. 78, 89.

We hardly consider *Warner* to be support for the position which the bank advances. As the above quote demonstrates, the decision was expressly limited to the particular facts involved. Moreover, there are no exceptional circumstances involved here which would justify the bank's failure to follow the clear terms of the will. There was no urgent need for making this gift, and no issue of preserving trust assets is involved. The bank knew it had no authority to act without the concurrence of one of the sisters, and it further knew that the intended beneficiary was not qualified to take under the express terms of the will. The breach of duty in the present case is clear, and we cannot condone it. We hold that the bank breached its duty as a trustee by giving \$250,000 to the New Chicago Foundation through the chosen conduit organization, and that the circuit court erred in retroactively approving said gift.

The Stuart sisters maintain that the proper remedy for the bank's breach of trust is to require repayment of the gift, to disqualify the bank from acting further as a trustee, and to disqualify it from participating in the selection of charitable beneficiaries.

We agree that the bank must restore the amount which was improperly released from the estate. A trustee is personally liable for any loss occasioned by a violation of his duties as trustee. (Restatement (Second) of Trusts sec. 226 (1959); *Piff v. Berresheim* (1950), 405 Ill. 617, 3 A. Scott, Trusts sec. 205 (1967); 4 A. Scott, Trusts sec. 386 (1967).) This rule applies where the violation is a result of negligence or mere oversight as well as when the trustee is wrongfully motivated. (*Chicago Title & Trust Co. v. Chief Wash Co.* (1938), 368 Ill. 146; see generally 3 A. Scott, Trusts sec. 201 (1967).) Here, the unauthorized and unilateral payment to an unqualified beneficiary reduced the value of the estate by \$250,000, and the bank, on remand, will be required to return this sum to the estate together with interest computed from the date of the gift.

We do not, however, determine that the bank should be removed as a trustee or disqualified from participating in the selection of charitable beneficiaries. The Stuart sisters contend that such an additional sanction is necessary as a deterrent and as punishment for the bank's breach of trust. The sisters characterize the bank's conduct as self-dealing and assert that the bank succumbed to a conflict of interest. In our view, the record does not conclusively establish a basis for such a contention. Nor are we unmindful of the fact that disqualification of the bank would in reality be a punishment of the intervening charities which are listed as beneficiaries in the bank's plan of distribution. We, therefore, determine that no additional sanctions are warranted under the facts of the instant case.

We turn next to the issues raised concerning the interpretation of the will of Harold Stuart. In several places in the first six articles of the will the testator directed gifts to charity. In each instance the testator merely directed that the gift be paid to "such qualified charitable organizations as may be selected by my Executors," or used a similar expression which carried the same meaning. The dispute involved in the instant appeal concerns the provisions of Article Seventh of the will. Article Seventh contains a number of what may be termed standard provisions relating to the powers of the trustees and the administration of the estate. Article Seventh, however, also includes the following provision.

"A majority of the Trustees or of the Executors, as the case may be, may take any action hereunder with the same force and effect as though all the Trustees or Executors had joined therein, *provided that the corporate Trustee or corporate Executor shall be one of such majority*. If at any time there shall be only one individual Trustee or Executor surviving, then in the event of any disagreement between the two Trustees or Executors, the determination of the corporate Trustee or corporate Executor shall control." (Emphasis added.)

The circuit court and the appellate court both found that this provision required the concurrence of the bank in the selection

of any charitable beneficiaries. The Stuart sisters, IIT and the Art Institute, an intervenor, all contend that the above-quoted provision does not preclude the application of majority rule to the selection of charitable beneficiaries by the three trustees.

Plaintiffs challenge the circuit and appellate courts' interpretation of Article Seventh on several grounds. The Art Institute contends that the provision was not intended to apply to distributive powers, but rather was limited in application to the administrative duties of the trustees. IIT and the Stuart sisters contend that the provision should be read as a directive to the bank to act as a tie-breaker whenever the individual co-trustees are in disagreement. It is also contended that if the provision is interpreted as allowing a deadlock, majority rule should still apply because the will fails to provide a mechanism for breaking that deadlock.

At common law a majority of the trustees of a charitable trust were competent to exercise the powers conferred upon them, unless the terms of the trust provided otherwise. (Restatement (Second) of Trusts sec. 383 (1959).) This rule was extended by statute to private trusts as well. The applicable statute provided that in cases of multiple trustees, "a majority of the trustees shall be competent to act in all cases, * * * unless the instrument of authority creating the trust shall otherwise provide." (Emphasis added.) (Ill. Rev. Stat. 1963, ch. 148, par. 33.) The basic issue to be determined in regard to all the will interpretation arguments raised by plaintiffs is whether the provisions of Article Seventh preclude the application of "majority rule."

The duty of a court in construing a will is to determine the intention of the testator. (*Feder v. Luster* (1973), 54 Ill. 2d 6.) The intent is to be ascertained by viewing the will as a whole and by giving to the words used their plain and ordinary meanings. (*Helms v. Darmstatter* (1966), 34 Ill. 2d 295; *In re Estate of Breault* (1963), 29 Ill. 2d 165.) If the testator's intention

can be gathered from the language of the will, no resort will be made to technical rules of presumed intention. (*Storkan v. Ziska* (1950), 406 Ill. 259.) We do not consider the language of Article Seventh to be vague, doubtful or uncertain. The previously quoted provision expressly states that the majority of trustees may take "any action hereunder * * * provided that the corporate Trustee * * * shall be one of such majority." The only reasonable interpretation to which this language is susceptible is that a majority of the trustees could take effective trustee action only if the bank was one of that majority.

It is contended, however, that such an interpretation places Article Seventh in conflict with the earlier provisions devising the estate to charitable organizations "as may be selected by my trustees." This contention is untenable. Article Seventh is the only portion of the Stuart will in which effective trustee action is defined. The earlier dispositive articles provide only that the trustees shall select the charitable beneficiaries, and do not dictate the manner in which an effective selection is to be made. Thus the dispositive portions of the will cannot be considered to be in conflict with Article Seventh for the elementary reason that they do not pertain to the same subject matter.

Because the language of Article Seventh, when read either in isolation or in relation to the entire will, unambiguously and clearly requires that the corporate trustee be one of any majority of trustees, we cannot accept the argument that the provision only requires that the bank act as a tie breaker. Nor can we accept the contention raised by the Art Institute that the majority provision of Article Seventh applies solely to administrative rather than dispositive matters. The use of the expansive phrase "any action hereunder" is a clear indication that the testator intended the majority clause to apply to the entire will. The word "hereunder" is used several times in Article Seventh and each time is used in reference to the entire will and cannot reasonably be said to be limited to Article Seventh. We hold,

therefore, that the circuit and appellate courts correctly interpreted the will of Harold Stuart in this regard.

The Stuart sisters further contend that because the will provides no means to break a deadlock, the statutory policy of majority rule should apply. We do not agree. The statute involved provides only that majority rule shall apply "unless the instrument or authority creating the trust shall otherwise provide." (Ill. Rev. Stat. 1963, ch. 148, par. 33.) The statute thus does no more than to provide for majority rule when the instrument creating the trust is silent on that matter. Here, the will was not silent on the subject, and the fact that the will allows for the possibility of a deadlock is not a sufficient reason to disregard the expressed intention of the testator.

We next consider plaintiffs' contention that the circuit court erred in the manner in which it resolved the deadlock. As previously mentioned, the trial court essentially adopted the plan of distribution proposed by the bank and did not purport to create its own scheme of distribution. The trial court did, however, adopt the plan of the plaintiffs as to the distribution of the remainder of the trusts in which the Stuart sisters held life estates. The plaintiffs contend that that circuit court erred in failing to develop its own, independent plan of disposition once the court determined that a deadlock existed. Similarly, the plaintiffs contend that the bank's plan, which the circuit court adopted, was unreasonable and unsupported by the evidence. We do not consider that the trial court erred in failing to frame a wholly new scheme of distribution, nor do we consider that the entire plan of the bank was unsupported by the evidence.

Where trustees who are required to make discretionary decisions reach an irreconcilable difference of opinion, the deadlock must be resolved by the courts. (*Dingman v. Boyle* (1918), 285 Ill. 144.) Both sides of this controversy refer us to the Second Restatement for guidance and for a description of the procedure which a court of equity will follow when framing a

scheme of charitable distribution. Restatement (Second) of Trusts secs. 396, 397, 399 (1959).

Section 397 of the Restatement provides, in part, that "a disposition for charitable purposes will not fail because of the failure of the trustee to act or for want of a trustee." Comment c to section 397 refers to a situation similar to that involved in the present appeal.

"Where the settlor leaves property for such charitable purposes as the trustee may select, and the trustee named is unable or unwilling to make the selection, and the settlor did not manifest an intention that the intended charitable trust should not arise or should not continue if the person named by him should not act as trustee, the court will either appoint a new trustee to make the selection or will frame a scheme for the application of the property. * * * [T]he court will frame a scheme for the application of the property, as it does in situations where a particular charitable purpose fails and the doctrine of *cy pres* is applicable. See sec. 399, comment d."

Thus, though the *cy pres* principle does not, strictly speaking, apply to a situation where co-trustees with the discretion to select charitable beneficiaries are unable to act, the court will be guided by the procedures which have been established under that doctrine.

Comment d to section 399 mentions certain factors the court will consider in framing a scheme of charitable distribution.

"Under the circumstances stated in this Section, the court will direct the framing of a scheme to apply the trust property for some charitable purpose falling within the general charitable intention of the settlor. In framing a scheme the court will consider evidence as to what would probably have been the wish of the settlor at the time when he created the trust if he had realized that the particular purpose could not be carried out. The court will consider not only the language of the trust instrument, but also such circumstances as indicate what would have been the probable desires of the settlor, such as the character of the

charitable gifts previously made by him, the charities in which he had expressed an interest, his religious affiliations, his views on social, economic and political questions, and the like."

The testimony of relatives of the donor may also be considered in order to indicate the types of charities in which the donor had been interested. G. Bogert, *Trusts and Trustees* sec. 442 (2d ed. 1964).

We feel that the above provisions of the Second Restatement of Trusts generally indicate the proper procedures and considerations to be applied to a situation like the present. When confronted with the deadlock between the Stuart sisters and the bank, it was incumbent upon the trial court to resolve the dispute by either appointing a new trustee or by framing a plan of distribution. We do not agree, however, with the plaintiffs' contention that the trial court committed reversible error merely because after hearing extensive evidence it chose to substantially adopt the plan advanced by the corporate trustee. We cannot ignore the unique nature of the situation with which the trial court was confronted. It must certainly be considered unusual for a testator to leave an estate in excess of \$20 million to be distributed by his trustees to charity with no further guidance or direction. As the above-mentioned sections of the Second Restatement indicate, the primary duty of the court was to effectuate the probable charitable intent of the testator. The crucial issue is whether the evidence supports the conclusion that the court fulfilled this duty by ordering distribution pursuant to the plan which it did endorse. In determining this issue, the fundamental rule applies that the findings of a trier of fact will not be overturned unless contrary to the manifest weight of the evidence. E.g., *Brown v. Commercial National Bank* (1969), 42 Ill. 2d 365.

Evidence was presented on behalf of the various charitable organizations suggested as recipients by the bank, specifying the nature of the charity, the persons served, its financial needs, etc.

In our view, there was ample evidence to support the trial court's selection of the charitable beneficiaries sponsored by the bank and to reject the scheme of distribution advanced by the sisters. The language of the Stuart will offers no indication as to the probable charitable intent of the testator. Indeed, the only conclusion that can be drawn from the language of the will is that the testator had no specific plan as to which charities would share in his estate. Though the testimony of Elizabeth Stuart was to the effect that Harold Stuart did in fact have a particular plan in mind, and that he had a "list" of charities he favored, the trial court was not bound to accept her testimony at face value. Her testimony was not entirely consistent, and its credibility was weakened by the fact that the testator failed to disclose the alleged "list" of charities to his corporate trustee and in fact had indicated to the bank that the choice of the beneficiaries was to be entirely discretionary with the trustees.

Additionally, evidence was presented which indicated that the bank had framed its plan of distribution in a manner designed to determine the probable charitable interests of Harold Stuart. The testator's business records and tax returns were studied for evidence of prior charitable donations. The testator's diary was read to learn of past contacts with charities and their representatives. And Harold Stuart's closest business contacts were interviewed to ascertain those charitable organizations in which he had shown an interest. In sum, competent evidence was introduced to indicate that the probable intent of Harold Stuart would have been to favor a broad-based distribution to the type of charities listed in the bank's plan.

There was thus competent and credible evidence to support the circuit court's decision, as the trier of fact, to endorse and accept the beneficiaries proposed by the bank. We hold, therefore, that the circuit court's decision to accept the beneficiaries proposed by the corporate trustee in preference to the smaller number of beneficiaries endorsed by the individual trustees was not against the manifest weight of the evidence. We also find,

however, that certain aspects of the overall plan adopted by the court, which relate to the amount of the particular distributions, are either not supported by the evidence or are erroneous as a matter of law.

We determine that the circuit court erred in its denial of the relief requested by plaintiff IIT in count III of the second amended complaint. In that count, IIT asserted a vested right to an additional \$3.5 million of the estate. The facts relevant to this issue may be briefly restated. A formal "Statement of Intent" dated October 10, 1968, was signed by the Stuart sisters designating IIT to receive \$8.5 million. Subsequently, \$5 million was distributed to IIT, but the Stuart sisters never ceased their efforts to have that institution receive a greater amount. In a letter dated October 7, 1970, the bank designated IIT to receive an additional \$3.5 million as part of a total plan of distribution. This letter read in pertinent part:

"1. Increase the trust's present commitment to the Illinois Institute of Technology by an additional \$3,500,000 (To be used for endowment and Chicago-Kent College of Law. This raises the total commitment to IIT to \$8,500,000, the amount you originally suggested.)"

This letter was by coincidence drafted on the same date that IIT and the Stuart sisters filed their original complaint. In its answer to the complaint filed November 9, 1970, the bank reiterated this proposal, stating that "at the present time there is a disagreement among the trustees insofar as defendant proposes a total gift of \$8.5 million to IIT while the individual trustees demand a grant to IIT equal to three-quarters of the available trust assets." The bank also prayed that the court direct distribution in accordance with its plan which included a total grant to IIT of \$8.5 million. On June 15, 1971, the bank withdrew this proposal in a letter to the Stuart sisters. At the time of the sisters' final proposal of three-quarters of the estate to IIT, the bank had advised the sisters that approximately \$9 million would be available for distribution.

Article Fifth of Harold Stuart's will provided that if the trust could not be distributed within 5 years the executors were to select the charitable beneficiaries in writing prior to the expiration of that period of time. Article Fifth further provided that the interests of the selected charities would vest at the end of the 5-year period. IIT contends that the sisters' "Statement of Intent" of October 10, 1968, and the bank's letter of October 7, 1970, constitute a written designation of IIT as the beneficiary of an \$8.5 million grant. The appellate court rejected this argument, reasoning that there had been no simultaneous selection of IIT to receive \$8.5 million, and that there was no "meeting of the minds" because the sisters had designated IIT for three-quarters of the estate. 43 Ill. App. 3d 169, 198-99.

We initially note that resolution of this issue does not call for a resort to the niceties of contract law rules concerning offer and acceptance. It is apparent from the record before us that all three trustees had designated IIT as the recipient of at least \$8.5 million by the time this unfortunate controversy reached the courts. As its own pleadings indicate, at the time the suit was filed the bank proposed an \$8.5 million grant to IIT. The only disagreement stemmed from the fact that at that time the Stuart sisters had designated IIT to receive three-quarters of the available estate. The bank's decision to withdraw its proposal for an additional grant to IIT did not occur until some time after this litigation had commenced.

Our review of the record leads us to the inescapable conclusion that the bank withdrew its earlier proposal because of the then pending litigation and because the Stuart sisters would not endorse its total plan of distribution. The testimony of the bank officer charged with the overall supervision of the trust reveals no reason for the bank's withdrawal of the additional grant to IIT except that it was precipitated by the sisters' refusal to assent to the bank's total demands. Additionally, the bank officer could not recall the reason that certain of the other grants had been raised after the additional \$3.5 million to IIT was withdrawn.

These increased grants, together with several new gifts, were roughly comprised of the amount previously earmarked for IIT. In short, no evidence was offered to support the reduction in IIT's designation.

From the record before us, we can only determine that the bank's withdrawal of its proposal for an additional grant to IIT was arbitrary and unreasonable. The trustees had, in effect, all proposed that \$8.5 million was the minimum amount IIT should receive. The trial court should have accepted this figure as an amount over which the trustees had reached agreement, as was specifically stated in the bank's pleadings. Because there was no evidence to suggest that the amount of this grant subsequently became unreasonable or inappropriate, the circuit court erred in failing to find for IIT as to count III. We hold, therefore, that upon remand an order be entered directing that an additional \$3.5 million of the estate be distributed to IIT.

We next consider whether the evidence supports a total grant of \$1 million to the Chicago Historical Society. The Chicago Historical Society was listed as a beneficiary in the plan of distribution submitted by the bank. The amount of the gift was \$500,000. The society was also listed by the Stuart sisters as a beneficiary of \$500,000 of the remainder interest in the trust estates created for them. As mentioned, the bank submitted no plan to dispose of the remainder interests in the sisters' life estates. Neither the bank nor the sisters proposed to the court that the Chicago Historical Society should receive a gift of \$1 million. Yet, the effect of approving the designations by the sisters as to the charities to take from the remainders of their life estate trusts, while adopting the bank's plan for the distribution of the rest of the estate, was that the circuit court awarded the Chicago Historical Society a total of \$1 million.

It is contended that this is an inadvertent duplication. We find that it is not. Prior to the entry of the judgment order in the circuit court, IIT, the Stuart sisters, and the Museum of Science and Industry objected to the proposed decree and

requested certain modifications. The Stuart sisters specifically pointed out that the effect of the court's proposed ruling would be to give of the Chicago Historical Society \$500,000 from the remainder of the sisters' trust and \$500,000 from the other trust funds available for distribution by the trustees, making a total gift to that charity of \$1 million. The sisters urged in their objection that it was not their intent that the Chicago Historical Society should receive a total gift from all funds of more than \$500,000. The court nonetheless, in entering its final order of distribution, provided that the Chicago Historical Society should receive \$500,000 through the distribution plans submitted by the bank (which did not purport to distribute the remainder of the sisters' trusts), and it also approved the plan submitted by the sisters in count IV for the distribution of the remainder of the sisters' trusts, which plan provided for an additional \$500,000 to this charity. This clearly is not an oversight on the part of the court or a case of inadvertence. There were two separate funds involved in the litigation. The bank never proposed to participate in the distribution of the remainder of the sisters' trusts and denied that the court should order any distribution of this remainder as prayed by IIT in count IV. The plan the bank submitted in its answer to count II involved a distribution from the other funds which the will directed be set over to charity after the two \$1 million trust funds had been established for the sisters. We do not find the two separate distributions from the two separate funds as ordered by the court to be contrary to the manifest weight of the evidence.

The Museum of Science and Industry, an intervenor, contends that the trial court's judgment is against the manifest weight of the evidence in that the museum is limited to a gift of \$50,000, and, as a group 3 charity under the bank's plan, is prevented from sharing in the residual amount of the estate. The museum contends that, due to its size and the extent of its operations, it should be classified as a group 1 charity under the bank's approved plan rather than as a group 3 charity. Evidence was

introduced to demonstrate that the museum is a far more sizeable institution than the other charities which comprise group 3.

Although the evidence shows that the Museum of Science and Industry is similar in many respects to some institutions listed as group 1 charities, we cannot find that the listing of this institution as a group 3 charity is against the manifest weight of the evidence. The record reflects that the testator had visited the museum a limited number of times and had only a limited contact with a general interest in this institution.

We next consider plaintiffs' contentions in regard to the allocation of the \$6.5 million of funds in excess of the specific dollar amount of the court-approved plan. Plaintiffs contend that we should, at the least, direct that the circuit court conduct new proceedings and frame a scheme of distribution for the additional funds. Under the particular facts of the case, we find no reason to do so.

Under the court-approved plan, charities listed under groups 1 and 2 are to share in the excess funds on a *pro rata* basis. We find this aspect of the plan to be supported by the evidence. With the exception of the Museum of Science and Industry, only smaller charities with minimal contact with testator's sphere of interest were included in group 3. IIT is the only other charity which is precluded from taking a *pro rata* share of the excess funds, and the court could well have concluded that IIT's share of the estate was already of sufficient size. We cannot say that the circuit court's adoption of this aspect of the bank's plan is inequitable or contrary to the manifest weight of the evidence.

We finally consider whether the court awarded excessive or unwarranted attorneys' fees and trustees fees to the Stuart sisters. This issue is raised by a number of the charitable intervenors. The circuit court granted specific fees to the sisters and their attorneys following a special hearing on the matter, and the appellate court affirmed.

The facts relevant to this issue are fully stated in the opinion of the appellate court. (43 Ill. App. 3d 169, 202-03.) We shall restate only those facts deemed necessary to an understanding of our disposition of this issue. Intervenors basically contend that the Stuart sisters had no authority to employ counsel or to charge the trust estate for such fees. It is also alleged that the attorneys' services were performed for the benefit of IIT rather than the sisters, and, thus, are not chargeable to the estate. We do not agree and therefore affirm the judgments of the circuit and appellate courts.

The determination of the need for attorneys' fees and the amount of such fees is a decision which rests in the discretion of the trial court. (*Ingraham v. Ingraham* (1897), 169 Ill. 432, 471-72.) The trial court did not abuse its discretion by finding that the Stuart sisters justifiably retained counsel and commenced the present litigation. The trustees were hopelessly deadlocked over the manner in which they should discharge their duties as trustees, and resort to the courts was necessary to resolve the impasse. Where, as here, the litigation is the result of honest differences of opinion, attorneys' fees and litigation expenses will be chargeable to the estate. (*Orme v. Northern Trust Co.* (1962), 25 Ill. 2d 151, 165.) We hold that the trial court did not abuse its discretion by charging attorneys' fees and expenses incurred by the Stuart sisters to the estate or by approving the payment of trustee fees to the individual co-trustees.

Nor do we accept the intervenors' contention that the estate was charged for services performed on behalf of IIT. This contention stems from the fact that the same attorney represented both IIT and the Stuart sisters for a period of approximately 2 years. The attorney withdrew as counsel for IIT before the actual trial of the case. As the appellate court noted, the trial judge was aware of this period of dual representation and suggested that the fees be distributed between the sisters and IIT. Thereafter, a substantial reduction in the requested fees was made. We, therefore, hold that the trial court did not abuse its

discretion in regard to the allocation of the fees and expenses incident to this litigation.

The judgments of the circuit court of Cook County and of the appellate court are affirmed in part and reversed in part, and the cause is remanded for modifications and further proceedings consistent with this opinion.

*Affirmed in part and reversed
in part and remanded
with directions.*

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MICHAEL PODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1928

ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and **ILLINOIS INSTITUTE OF TECHNOLOGY**, a not-for-profit corporation,

Petitioners,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking association, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased,

and

CHICAGO HISTORICAL SOCIETY, et al.,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' ANSWERING BRIEFS

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IN THE

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ELIZABETH B. STUART, not individually, but as a co-trustee under the Last Will and Testament of Harold L. Stuart, deceased, and **ILLINOIS INSTITUTE OF TECHNOLOGY**, a not-for-profit corporation,

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Respondents.

**BRIEF IN REPLY TO
RESPONDENTS' ANSWERING BRIEFS**

ARGUMENT

It will be noted that respondent, Continental Illinois National Bank & Trust Company of Chicago, corporate trustee under the Harold L. Stuart Will, has chosen not to answer the petition for writ of certiorari filed by its co-trustee, Elizabeth B. Stuart, and by Illinois Institute of Technology (IIT), petitioners. The answering briefs are those of the re-

spondent charities (hereinafter sometimes referred to as "Intervenors"). While these charitable organizations have no interest in the vested grant to IIT, under the divided opinion in Stuart II they stand to receive all of the grant earnings accumulated during the more than six years of litigation required to establish IIT's entitlement to the vested grant. The briefs of intervenors, DePaul University, et al., and Chicago Historical Society, respectively, are cited (DeP. Br. ____) and (CHS. Br. ____). References to appendices, cited (App. ____ p. ___) are to those appended to the petition for writ of certiorari, cited (Pet. p. ___.)

The petition for writ of certiorari presents a single overriding issue, namely, whether the Illinois Supreme Court, having once determined in Stuart I with finality that "the Circuit Court erred in its denial of the relief requested by plaintiff IIT in Count III of the Second Amended Complaint," could subsequently in Stuart II alter that adjudication so as now to allow out of the "relief requested" only the principal amount of the vested grant, denying IIT the accumulated grant earnings, without violating procedural and substantive due process. The answering briefs of intervenors do not respond to this issue, but seemingly seek to evade it by repeated and unsupported assertions that Stuart I awarded the grant earnings to respondent charities.

I. INTERVENORS' CONTENTION THAT THE PETITION WAS NOT TIMELY IS ERRONEOUS AND BEGS THE QUESTION OF WHETHER STUART I ADJUDICATED IIT'S RIGHT TO THE VESTED GRANT EARNINGS.

The brief of intervenors DePaul University, et al., conveniently assumes, from start to finish, that the issue as to the accumulated earnings was decided in intervenors' favor in Stuart I. Begging the question, it argues that the petition for writ of certiorari must be viewed as an effort to

secure Supreme Court review of Stuart I rather than to review and reverse Stuart II. Thus, in their principal and lead argument (DeP. Br. pp. 8, 9), intervenors assert that Stuart I became final November 23, 1977, hence petitioners had ninety (90) days from that date within which to file their petition. Of course, under such a self-serving formulation, intervenors assert that the petition was not filed in a timely manner under 28 U.S.C., § 2101(c).

This formulation is contrary to the facts. Petitioners have not asked this Court to review and reverse Stuart I, nor do they seek to relitigate that initial decision of the Illinois Supreme Court which they contend was expressly stated to be in favor of IIT. They contend that Stuart II deprived IIT of due process in departing from an adjudication in IIT's favor concerning the vested grant earnings which was declared with finality in Stuart I. The ninety (90) day period within which to file the instant petition commenced with the denial of rehearing of Stuart II on March 30, 1979. The instant petition for writ of certiorari was filed within ninety (90) days of that date, properly invoking this Court's jurisdiction under 28 U.S.C. § 1257(3). Accordingly, *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) cited by intervenors, is inapposite.

Lest intervenors DePaul University et al. by their diversionary jurisdictional argument have confused matters, petitioners respectfully restate their contentions;

(a) Stuart I expressly adjudicated IIT's entitlement to the "relief requested" by IIT in Count III of the Second Amended Complaint.

(b) The "relief requested" in that Count expressly included "the increase, gains, income or profits accrued to the vested grant after June 30, 1971".

(c) The original adjudication in Stuart I became final on November 23, 1977, as is admitted by all parties in interest.

(d) The majority, in a divided opinion in Stuart II, departed from that earlier and final adjudication now limiting the relief sought by IIT in Count III to the principal amount of the grant, excluding the pleaded relief as to the accumulated grant earnings, in violation of the rules of *res judicata* and law of the case.

(e) In consequence, IIT has been deprived of procedural and substantive due process by the erroneous decision of the majority of the Illinois Supreme Court in Stuart II, the cause to which the petition for writ of certiorari is directed.

II. INTERVENORS' BRIEFS INCORRECTLY DESCRIBE THE DISPOSITION OF COUNT III IN STUART I.

In an inaccurate paraphrase of the Stuart I opinion, the brief of intervenors DePaul University, et al., could wrongly leave the impression that the Illinois Supreme Court, in the original opinion, directed that IIT should receive only the principal sum of \$3.5 million claimed under Count III, while denying the related Count III claim to accumulated earnings on the vested grant. Thus, intervenors assert (DeP. Br., p. 6); "The trial court also decided Count III adversely to IIT, and that judgment was affirmed by the Appellate Court. However, the Illinois Supreme Court held that \$3.5 million should be paid to IIT. No further amount was to be paid to IIT . . . ". The misleading paraphrase continues: "Thus, the Supreme Court said, in effect: pay \$3.5 million to IIT, and pay the balance of the Stuart estate to the charities, as selected under the trial court's plan of distribution."

It requires only a reading of the opinion in Stuart I to show that these representations are manifestly inaccurate.

(App. A, pp. A-3 to A-6). In no way did the Illinois Supreme Court's original opinion exclude IIT from receiving the accumulated grant earnings nor hold "in effect" that \$3.5 million only and "no further amount" was to be allowed IIT. Thus, again, as in the instance of their erroneous jurisdictional argument, intervenors resort to the practice of begging the question, deftly ignoring the express adjudications and findings in Stuart I which show that the Illinois Supreme Court there found the Count III issues in favor of IIT, *without limitation*. (Pet. pp. 13-15)

Intervenors' tactic is, perhaps, best illustrated in footnote 4 of their brief (DeP. Br., p. 13), where the adjudication argument is dealt with summarily in the same self-serving manner, thus: "In Stuart I, the earnings claim was decided against IIT. Under the doctrine of *res judicata*, IIT should not be permitted to relitigate the claim." (DeP. Br., p. 13) This practice is evident throughout the brief being repeated on the last page with the self-serving assertion: "IIT has had more than ample opportunities to present its earnings claim. Whenever the claim has been presented, it has been rejected." (DeP. Br., p. 14) In fairness to this Court, instead of such constant reiteration of their unsupported claim, intervenors should have explained, if they could, why the opening and unqualified holding of the Illinois Supreme Court in the Stuart I treatment of Count III, does not mean precisely what it says: "We determine that the Circuit Court erred in its denial of the relief requested by plaintiff IIT in Count III of the Second Amended Complaint." (App. A, p. A-3)

Similarly, the brief of intervenor, Chicago Historical Society, fails to mention that flat-out determination of IIT's entitlement to the relief it sought. Referring only to another finding of the Illinois Supreme Court later in the opinion that "the Circuit Court erred in failing to find for IIT as

to Count III", that intervenor weakly argues that the words, "as to Count III" could not allow, in addition to the \$3.5 million principal grant, the "increased gains, income or profits thereof" which were claimed in the pleading and prayer of Count III. Intervenor offers no explanation of why part of the relief explicitly pleaded concerning "principal" is to be upheld while the pleading as to the vested "grant earnings" was to be ignored. Nor does the majority of the Illinois Supreme Court explain the reason for the belated excision of a part of the original adjudication when they took up Stuart II.

Similarly, intervenors would have it appear to this Court, contrary to fact, that petitioners are now seeking new interpretations of the Stuart will. Petitioners simply ask adherence to the *prior findings and determinations* of the Illinois Supreme Court concerning the effect of the "vesting" under Stuart's will (App. D, p. D-7). Clearly pleaded in paragraph 17 of Count III, IIT based its entitlement to the accumulated grant earnings after June 30, 1971 on a construction of the will that "vesting" thereunder means vesting in *present enjoyment* with entitlement in a trustee designated grantee of earnings accumulating after that date. Petitioners seek no new construction of Stuart's will; they only ask that the Illinois Supreme Court adhere to the Stuart will interpretation which it necessarily adopted in Stuart I long before it chose a new *ratio decidendi* in Stuart II.

Intervenors response in the context of this prior interpretation of "vesting" is the vague assertion that "vested" has a somewhat different meaning in property law than in constitutional law (CHS. Br., p. 2). However, the final adjudication by the Illinois Supreme Court in Stuart I concerning the Count III theory of "vesting" must be given the same meaning in all contexts if deprivation of property

without due process of law, "in constitutional law", is not to occur.

Intervenors' statement, that the issue of IIT's right to accumulated grant earnings was not raised by IIT in the court below in Stuart I, is irresponsible, and, at best, a half-truth. While grant earnings, *per se*, separate and aside from Count III relief, generally, did not come up in the oral argument (as did not many similarly 'included' matters embraced in broad questions discussed in the limited time allowed for oral argument), it is incorrect to assert that the issue of IIT's entitlement to "the increases, gains, earnings or profits" was not presented to the Illinois Supreme Court in Stuart I. As stated above, paragraph 17 of Count III, pleaded to the effect that "vested" under Stuart's Will meant immediate enjoyment and possession after June 30, 1971 (App. D. p. D-8). Proof that the Count III "vesting" contention was presented in IIT's opening brief to the Illinois Supreme Court in Stuart I is also disclosed by the answering briefs of Loyola University (p. 44), and DePaul University, et al., (pp. 3-4, in Dockets 49070 and 49074) and their responding argument captioned, "IIT's Vested Rights Argument Is Unsupportable". In short, the earnings issue was continuously before the Illinois courts throughout Stuart I.

In Stuart I, the determination that "the Circuit Court erred in its denial of the relief requested by plaintiff IIT in Count III of the Second Amended Complaint", is but one of several instances whereby the Illinois Supreme Court expressly referred to the specific pleading described as Count III. Intervenors contend that the highest court of Illinois did not understand what it was writing in Stuart I concerning the allegation and prayers for "relief" in the key pleading described as Count III. Intervenors weakly argue, "It is unthinkable that a reviewing court should be deemed

to have examined and decided material presented only through the Abstract of Record . . .". (DeP. Br. pp. 12-13). Actually, in light of that court's frequent references in Stuart I to Count III, it is only logical to assume that the Illinois Supreme Court well understood the dimensions and prayers of Count III when it decided Stuart I and was not carelessly unmindful of what that pleading contained.

Acceptance of intervenors' tenuous theory of side-stepping the Stuart I adjudication, if given credence, would make a shambles of the doctrines of *res judicata* and law of the case. Under such an approach questioning a decision after the fact, adjudications of courts would never have finality. The test of such finality would not be what a court actually wrote in its opinion or judgment order. Instead, there would be an ongoing inquiry at the insistence of a losing litigant into the question of whether the adjudicating court properly understood the record, whether it had read the pleadings, and whether the specific point at issue was brought up and adequately presented in oral argument. The mere statement of such unprecedented conditions qualifying the application of the rules of *res judicata* and law of the case, demonstrates the fallacy of the argument. Actually, intervenors' suggestion that the Illinois Supreme Court failed to study Count III, on its face is an admission of the original and final adjudication in Stuart II which intervenors struggle to escape.

Intervenors' argument that the federal constitutional issue herein was not raised in a timely manner by petitioners is equally unsound. The Petition, pp. 9-10, discloses the instances and the manner in which petitioners raised the serious and inescapable Fourteenth Amendment considerations of due process. Deprivation of due process was first threatened, and first occurred, in the remand proceedings in Stuart II (not as intervenors imply over the preceding six

years of litigation required to establish IIT's right to the Count III relief), when intervenors revealed their effort to deprive IIT of the accumulated grant earnings; also when the trial court on remand indicated the possible entry of an order having the unconstitutional effect. Clearly, petitioners then promptly asserted and thereafter preserved the substantial constitutional issue at all relevant times. (See Pet. pp. 9, 10)

III. INTERVENORS' BRIEFS ARE UNRESPONSIVE CONCERNING THE APPLICABILITY OF THE RULES OF RES JUDICATA AND LAW OF THE CASE, AND THE RELATION OF THOSE RULES TO THE DUE PROCESS ISSUE.

Perhaps, the most revealing aspect of the weakness of intervenors' position before this Court is their failure to respond to petitioners' arguments and cited authorities invoking the doctrines of *res judicata* and law of the case; also in failing to respond to petitioners' contention that the Illinois Supreme Court deprived IIT of both procedural and substantive due process in departing substantially from its earlier and final adjudication in favor of IIT. The general evasionary response of intervenors here again is to present irrelevant arguments, such as, "Petitioners' Tactics In The Courts Below Should Bar Them From Any Further Review" (DeP. Br., 12); and "IIT had an appropriate form of recourse: a Petition for Rehearing, filed within the requisite time period following the entry of the Stuart I Opinion", (again assuming the question at issue in intervenors' own favor); and intervenors unmasked bid for a decision based upon an appeal for more charitable trust funds from Stuart's trust, a tactic pursued in the Illinois Supreme Court when Stuart II was considered, i.e., ". . . IIT had emerged with \$8.5 million in distributions from the estate, a figure more than six times the amount received by any other charity. . ." (DeP. Br., 13)

Intervenors simply provide no meaningful discussion of the legal arguments presented by petitioners regarding the effect of the Stuart I adjudications and the violation of due process which occurred in Stuart II.

Through the remand proceedings in Stuart II, intervenors' principal reliance, in seeking to deprive IIT of the accumulated earnings from its vested grant, was on the single sentence in Stuart I, opinion reading:

"We hold, therefore, that upon remand, an order be entered directing an additional \$3.5 million of the estate to be distributed to IIT." (App. A, p. A-6)

They would read that sentence as the sum total of the opinion. Obviously, that sentence was intended by the Illinois Supreme Court to be read consistently with its prior explicit determinations and findings in the four preceding pages of the opinion upholding IIT's right to the relief sought in Count III. (App. A, pp. A-3 to A-6)

As pointed out in Mr. Justice Underwood's dissent in Stuart II, the majority made clear in their opinion that the Court did not "exclude an increase to the IIT grant in the earlier opinion". (App. C, p. C-6) Certainly, the above quoted sentence to the effect that a \$3.5 million grant would be allowed "upon remand" did not exclude nor did it negate other Count III relief, including the vested grant earnings to the extent such relief was allowed and determined earlier in the opinion, nor was it necessarily inconsistent therewith. There is obviously no logic in treating the final sentence of the opinion pertaining to Count III as if it alone were the "judgment" or "holding" of the Court, as intervenors would have it read (DeP. Br. p. 10), while rendering meaningless all other Stuart I determinations including the explicit opening adjudication that: "We determine that the Circuit Court erred in its denial of the relief re-

quested by plaintiff IIT in Count III of the Second Amended Complaint."

The mandate of the Supreme Court of Illinois, dated December 2, 1977, (App. B) was, in general form, expressly adopting, incorporating by reference and attachment, the full opinion of the court in Stuart I. The "judgment" of Stuart I is found in the following paragraph of the mandate:

THEREFORE, it is considered by the Court that for that error and others in the records and proceedings aforesaid, the judgments of the Appellate Court for the First District and the Circuit Court of Cook County, in this behalf rendered, BE AFFIRMED IN PART AND REVERSED IN PART *in the respects set out in the opinion of this Court*, and that this cause be remanded to the Circuit Court of Cook County for modifications and further proceedings *consistently with the opinion attached to this mandate*. (Emphasis added) (App. B, p. B-2)

In the context of a mandate in such form adopting the entire opinion, the pertinent Illinois cases show that such a mandate means precisely what it says. The lower court, on remand was required to give effect to the opinion to fulfill the directions of the mandate. *People, ex rel, Olson v. Scanlon*, 294 Ill. 64, 128 N.E. 328 (1920); *Merrill v. Drazek*, 58 Ill. App. 3d 455, 374 N.E. 2d 792 (1978). In determining what the Illinois Supreme Court adjudicated in Stuart I, it is therefore necessary to give effect to all determinations and findings as to Count III relief, not simply the isolated sentence upon which intervenors rest their case. The cases cited by intervenors' namely, *Adams v. Pearson*, 41 Ill. 431, 104 N.E. 2d 267 (1952); *People, ex rel. William J. Scott v. Chicago Park District*, 66 Ill. 2d 65, 360 N.E. 2d 773 (1976); *Black v. Cutter Laboratories*, 351 U.S. 291 (1956), and *Federal Communications Commission v. Pacific Foundation*, 438 U.S. 726 (1978), do not support their position.

IV. THERE ARE SUBSTANTIAL AND IMPORTANT REASONS WARRANTING REVIEW OF STUART II ON WRIT OF CERTIORARI.

The substantiality and broad importance of the question presented by the petition for writ of certiorari cannot be obscured by intervenors' narrow characterization of the case as involving no more than a local will construction problem and as presenting no important principle of law. Actually, this case presents a substantial and highly important federal question bearing on the administration of justice in the State courts of last resort as well as all other judicial tribunals. There is, indeed, a direct operative relation between the doctrines of *res judicata* and law of the case, on the one hand, and the uniformity, certainty and good order of judicial administration, on the other hand, which depicts an important national interest entitled to protection. Long ago, as it is equally true today, this Court observed in *Johnson Company v. Wharton*, 152 U.S. 252, 257 (1893):

"The peace and order of society demand that matters distinctly put in issue and determined, by a court of competent jurisdiction as to parties and subject matter, shall not be retried between the same parties in any subsequent suit in any court."

When a departure from *res judicata* and law of the case occurs at the level of a State's court of last resort, in a proceeding not otherwise reviewable by this Court, then, certainly, the total interest of the due administration of justice is impaired. In such context, when there is no other possible recourse for relief, a deprivation of due process becomes all the more serious a matter. Thus, the instant case, whether standing alone in its own right as a matter of justice to IIT, a major American technological institution or viewing the case in its representative and illustrative

aspect speaking for the due administration of justice at the highest State court levels, it is substantial and significant. It highlights the fact that the only real sanction for upholding the fundamental doctrines of *res judicata* and law of the case against judicial abuse necessarily lies in review by this Court.

The petition herein is also significant because the due process question, surprisingly, appears to be one of first impression in the annals of this Court. Exhaustive review by counsel for petitioners has disclosed no case in this Court in which the due process sanction has, as yet, been utilized to undergird and enforce adherence by all courts below to the standards of *res judicata* and law of the case. The only federal decision petitioners have found dealing explicitly with the precise question of whether and when violation of *res judicata* and law of the case constitutes a deprivation of federal due process, is *Sotomura v. County of Hawaii*, 46 Fed. Supp. 473 (1978) where the court, not surprisingly, held that "... where a refusal of a State court to apply *res judicata* in a second proceeding results in a direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge the owners' constitutional right to due process." Of course, this Court has defined, in nonconstitutional contexts, the existence and viability of the rules of *res judicata* and law of the case. Cf. *South Pacific Railway Co. v. U.S.*, 168 U.S. 149. What is needed is its affirmation of positive sanction for those rules.

The expression in *Sotomura* is a teaching of such importance that it warrants pronouncement by this Honorable Court so as to provide a clear line of consistent and predictable action by all courts, including those functioning at the highest State level of last resort. The issuance of the writ will significantly serve the total administration of justice.

CONCLUSION

For the reasons stated above, petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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